(1)

NO. 9416 JAN 25 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

HONORIO GARZA
PETITIONER

VERSUS

UNITED STATES OF AMERICA
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

HERIBERTO MEDRANO
1101 WEST TYLER
HARLINGEN, TEXAS 78550
TELEPHONE 210/428-2412
FACSIMILE 210/428-2495

ATTORNEY FOR PETITIONER
HONORIO GARZA

144

QUESTIONS PRESENTED

1. Does the panel decision in this case conflict with this Court's opinion in *Marshall v. United States*, 360 U.S. 310 (1959) (per curiam)?
2. Whether the prosecutor's final argument violated Defendant's right against self-incrimination and constituted a comment on Defendant's failure to testify?
3. Whether the prosecutor's final argument constituted an impermissible attempt to shift the burden of proof?

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceeding below were Petitioner, HONORIO GARZA, and the following Defendants below:

Matilde Perez, Rogelio Bermea, Baldemar Bermea, Guadalupe Bermea, Manuel Garcia, Enrique Avalos, Refugio Pedraza, Teodoro Pedraza, Ricardo Rodriguez, and Lorenzo Rodriguez as well as the Plaintiff and Respondent therein, The United States of America.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED.....i

LIST OF PARTIES TO THE PROCEEDING.....ii

TABLE OF AUTHORITIES.....iv

OPINION BELOW.....1

BASIS FOR JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....9

CONCLUSION.....14

APPENDIX A.....1a

APPENDIX B.....67a

APPENDIX C.....69a

APPENDIX D.....71a

APPENDIX E.....75a

TABLE OF AUTHORITIES

PAGE

Davis v. United States,
160 U.S. 469 (1845).....8, 13

Griffin v. California,
380 U.S. 609 (1965).....7, 8, 13

Lilienthal's Tobacco v. United States,
97 U.S. 237 (1878).....8, 13

Marshall v. United States,
360 U.S. 310 (1965).....5, 6, 9, 11

CONSTITUTION AND STATUTES

U.S. Const. Amend V.....2

21 U.S.C. 846.....2

28 U.S.C. 1254(1).....2

NO._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

HONORIO GARZA
PETITIONER

VERSUS

UNITED STATES OF AMERICA
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment opinion of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 30 F.3d. 1539 (5th Circuit, 1994) is reprinted in the appendix (App. A infra, 1a -66a). The order on the motions for rehearing are reprinted on the appendix.

JURISDICTION

The opinion of the Court of Appeals was on August 25, 1994. A timely Petition for Rehearing with a Petition for Rehearing En Banc was denied on October 7, 1994. (Pet. App.) The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1). (App. B, infra, 67a -68a, and App. C, in infra, 69a-70a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> [N]or shall any person...be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.....

Title 21 U.S.C. δ 846:

> Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the

offense, the commission of which was the object if the attempt or conspiracy.

STATEMENT OF THE CASE

Defendant was tried and convicted on two counts of a four count indictment which charged in Counts I, that from on or about December 1, 1987 and continuing thereafter until on or about July 30, 1988, Appellant knowingly and intentionally conspire with others to possess with intent to distribute more than 100 kilograms of marijuana, and on Count 2, that on or about November 14, 1988, and continuing thereafter until on or about May 8, 1989, Appellant knowingly and intentionally conspired with others to possess with intent to distribute more than 100 kilograms of marijuana.

1. Appellant's trial was surrounded by extensive and prejudicial media coverage. There was almost daily coverage in the leading

area newspaper. One of these articles prominently mentioned the guilty plea of a Co-Defendant, Eleazar Bermea, who according to the article, admitted to the existence of a conspiracy and that stated that the other Co-Defendants were involved. Eleazar Bermea did not testify. (emphasis added)

Another incident involved a nationally televised news documentary program, Street Stories, on CBS.

The Street Stories episode focused on drug trafficking in Starr County, calling it "a smuggler's paradise", and showing footage of Defendant, a Starr County Constable, along with other Starr County Officials who had plead or been found guilty. The panel decision correctly concluded that the cited above publicity was innately prejudicial and disseminated in such a way so as to be likely to have come before the jury.

Defense counsel repeatedly requested the Trial Court to conduct individual voir dire of the jury panel on the issue of exposure to the innately prejudicial publicity. The Trial Court refused. The panel affirmed.

In doing so, the panel stated: "There is a paucity of Supreme Court authority on the subject of midtrial publicity," and that "[t]he Supreme Court has not set down many guidelines for resolving the problem of midtrial publicity..." Op. at 1556.

The panel cited the case of *Marshall v. United States*, 360 U.S. 310 (1959) (per curiam), where this Court reversed Defendant's conviction where jurors had been exposed to prejudicial publicity concerning the Defendant. Defendant's conviction there was reversed, even though the judge in that case conducted individual voir dire of the jurors in his chambers and concluded that the

Defendant would not be prejudiced by the newspaper articles.

The procedure adopted by the trial court and the panel in this case is in conflict with this Court's decision in *Marshall v. United States*, 360 U.S. 310 (1959) (per curiam).

2. During final argument, the prosecutor made a number of improper and prejudicial statements which called to the jury's attention and sought to focus on the Defendant's failure to present evidence or testify. Further, the prosecution's statements constituted an attempt to shift the burden of proof.

Specifically, the prosecutor accused appellant's counsel of not discussing the facts, and not discussing any phone calls. Defendant immediately objected (S.F. XVI - 1969). The prosecutor continued, by stating "Did he talk to you at all about the phone

calls form Honorio Garza to Eleazar Bermea...?"[1] (S.F. XVI 1969) Defendant promptly objected since there was no evidence of any phone calls made by Defendant. The prosecutor admitted her error (S.F. XVI 1970), then the prosecutor continued: "no attempts have been made to explain that situation." Counsel again objected. (S.F. XVI 1970). But the prosecutor continued, stating: "There's never going to be enough evidence for a defense attorney." (S.F. XVI 1973)

The prosecutor continued by attacking other defense counsel stating that they did not talk about the facts (S.F. XVI 1965, 1968): "<u>They only shifted the burden of proof</u>," (S.F. XVI 1966) (emphasis added).

The Fifth Amendment forbids comments by the prosecutor on the accused silence.

---

[1] Eleazar Bermea was the Co-Defendant who earlier plead guilty and was quoted in the newspaper as admitting to the existence of a drug conspiracy and that the other Co-Defendants were involved.

Griffin v. California, 380 U.S. 609, 615 (1965). Further, this Court has held that in criminal cases the burden of proof never shifts. *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1878). This Court has further held that it is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. *Davis v. United States*, 160 U.S. 469 (1895).

The prosecutors improper statements sought to focus on Defendant's failure to testify and to shift the burden of proof. This is made clear by the prosecutor's repeated improper argument and it was especially prejudicial because the Government's main witness implicated Defendant's right to remain silent when he stated that what he was saying about the Defendants was true and that all counsel had

to do is "Ask them. They're right there." (S.F. III 251)

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW, WHETHER THE PROCEDURE ADOPTED BY THE TRIAL COURT CONCERNING VOIR DIRE DUE TO PREJUDICIAL MID-TRIAL PUBLICITY VIOLATED THE DECISION IN *MARSHALL V. UNITED STATES*.

As the panel decision noted, Defendant's case was surrounded by extensive media coverage. The panel focused on two specific instances of mid-trial publicity, the newspaper account of a Co-Defendant's plea of guilty, and an episode of nationally televised news program, Street Stories, on CBS.

The first episode dealt with the plea of Co-Defendant Eleazar Bermea, and his detailed recitation of his admissions regarding the existence and operations of the marijuana trafficking conspiracy.

The second instance, the Street Stories episode chronicled public corruption in Starr County and specifically mentioned Honorio Garza in conjunction with other prominent Starr County residents who had already pleaded guilty or had gone to jail for drug offenses. Defendant's name, photograph and indicted status were included or described in the broadcast in close proximity to the persons who had pleaded guilty or had already gone to prison.

The panel concluded that "these two instances of publicity contained material that was innately prejudicial. Op at p. 1558.

The panel next considered the likelihood that this admittedly prejudicial account reached the jury, and stated: "[I]t appears that the prejudicial television broadcast was widely and freely disseminated in a manner likely to reach some jurors, while the prejudicial newspaper story was probably not

as likely to come to their attention." Op. at 1558.

The panel then examined the procedure adopted by the trial court. After reviewing previously approved procedure the panel stated: "The procedures followed by the District Judge in the instant case, however, do not precisely match those used in any of the precedent cited above." Op. at 1559. The panel noted that district court did not conduct individual voir dire as requested by the Defendant.

In *Marshall v. United States,* 360 U.S. 310 (1965), this Court reversed the Defendant's conviction where the jurors had been exposed to prejudicial publicity concerning the Defendant. Defendant's conviction was reversed even though the District Judge conducted individual voir dire an chambers and concluded that Defendant would not be prejudiced by the adverse publicity.

The procedure adopted here by the Trial Court, violated *Marshall v. United States*, in that the Trial Court should have conducted individualized voir dire of the jurors in open court.

This case further presents this Court the opportunity to clarify the procedure to be used when confronted with prejudicial mid-trial publicity.

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW, WHETHER 1) THE ARGUMENTS PRESENTED BY THE PROSECUTOR FOCUSED ON DEFENDANT'S FAILURE TO TESTIFY AND THEREFORE VIOLATED HIS RIGHTS AGAINST SELF-INCRIMINATION AND 2) WHETHER SAID ARGUMENTS CONSTITUTED AN IMPROPER ATTEMPT TO SHIFT THE BURDEN OF PROOF.

Defendant contends that the actions of prosecutor were intend to comment on his failure to testify and to improperly attempt to shift the burden of proof, and that this

violated Defendant's rights and violated Supreme Court precedent.

This Court has held that it is error for the prosecutor to comment on the accused silence. *Griffin v. California*, 380 U.S. 609, 615 (1965). Further, the burden of proof never shifts in a criminal case, *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1878); and, it is never the duty of the accused to establish his innocence or disprove the government's case. *Davis v. United States*, 16 U. S. 469 (1895).

The prosecutor repeatedly made comments that Defendant and his Co-Defendant did not discuss an facts.[2] The prosecutor continued by stating "no attempts have been made to explain that situation." (S.F. XVI 1970). She even called upon Defendant to explain things on which there was no evidence. (S.F.

---

[2] The prosecutor made this argument repeatedly even though it was not true at least insofar as this Defendant was concerned. See (S.F. XVI 1893-1904)

XVI 1969) She continued by attaching the failure of other defense counsel to discuss any of the facts, and stated that "there is never going to be enough evidence to a defense attorney." (S.F. XVI 1973) "They only shifted the burden of proof." (S.F. XVI 1966)

Defendant contends that these repeated arguments manifested an intentional decision on the part of the prosecutor to comment on Defendant's failure to testify and to attempt to shift the burden of proof.

This Court should grant the writ to examine these statements to determine if they run a foul of applicable precedent and the Constitution.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

HERIBERTO MEDRANO
STATE BAR NO. 13897800
FEDERAL I.D. NO. 5952

LAW OFFICES OF
HERIBERTO MEDRANO
1101 WEST TYLER
HARLINGEN, TEXAS 78550
TELEPHONE 210/428-2412
FACSIMILE 210/428-2495

APPENDIX OF PETITIONER

APENDIX A

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, KING and WIENER, Circuit Judges.

KING, Circuit Judge:

This case presents a myriad of issues common to appeals of drug conspiracy convictions. Two less common issues are difficult. One such issue concerns the failure of the district court to conduct individual voir dire of the members of the jury following prejudicial midtrial publicity. The other such issue concerns the treatment of a pending *James* motion, ultimately ruled on at trial, under the Speedy Trial Act.

I. BACKGROUND

A. FACTS

The appellants in this case were charged with participating in one or both of two conspiracies to possess marijuana with the intent to distribute. The first of these conspiracies, lasting from late 1987 to mid-1988, allegedly involved eight persons, including appellants Matilde Perez, Manuel Garcia, Honorio Garza, Enrique Avalos, Teodoro Pedraza, and Lorenzo Rodriguez. The second conspiracy lasted from late 1988 through early 1989, and it allegedly involved seven persons, including appellants Perez, Garza, Rogelio Bermea, Baldemar Bermea, and Guadalupe Bermea.

1. The First Conspiracy

Jaime Rios Gonzalez, an informant who began working for the Drug Enforcement Administration (DEA) and other government agencies in 1988, testified at trial as follows. In 1988, Gonzalez was staying at a ranch owned bv Garcia, getting

paid about $200 per week for doing "mostly nothing." (Other testimony at trial indicates that Garcia's ranch was located just north of Mission, Texas, which is in Hidalgo County near the border with Mexico.) Avalos and Rodriguez also worked at Garcia's ranch while Gonzalez was there, and Gonzalez identified Avalos as Garcia's closest associate.

At some point, Garcia revealed to Gonzalez that he owned a grain trailer with a secret compartment used for carrying large quantities of marijuana. Garza, a constable of Starr County, Texas (adjacent to Hidalgo County), and Perez came to Garcia's ranch on one occasion, and Gonzalez overheard Perez tell Garcia not to let his workers "get lost" because he had some work coming up. A little later, Garcia told Gonzalez and other workers that Perez and Garza would soon be providing a "load." A few days later, Gonzalez and Rodriguez went to a different ranch owned by Carlos Gomez, where they met Garcia, Garza, Avalos, and several other men. That night, which was sometime in July 1988, Gonzalez, Avalos, Rodriguez, Garcia, and the others loaded bundles of marijuana into the secret compartment in Garcia's grain trailer; Gonzales was told by Avalos and Garcia that the load contained over 1800 pounds. Although Garza was not present during the loading of the marijuana, Garcia told Gonzalez that Garza and Perez had supplied the marijuana.

The trailer containing the marijuana remained on the Gomez ranch for at least two weeks before Garcia gave the order to move it. Another of Garcia's employees, Pepe Villarreal, drove the tractor-trailer, while Gonzalez accompanied Avalos and Rodriguez in another vehicle. Ultimately the tractor-trailer was taken to the home of one "Shorty" Pedraza, which Gonzalez described as being in the country near Giddings, Texas. There Gonzalez, Villarreal, Rodriguez, Avalos, and Teodoro Pedraza unloaded the marijuana and stored it in a shed on Shorty Pedraza's property. Within the next few days, someone identified as "Ruben" arrived with Garza

in a truck equipped with a U-Haul trailer, and the men loaded 600 pounds of marijuana (apparently into the U-Haul). Gonzalez saw Ruben pay Garza an indeterminate amount of money, and Gonzalez then left with Villarreal to return to Garcia's ranch. A few days later, Gonzales saw Perez and Garza come to Garcia's ranch and deliver four plastic sacks containing money to one of Garcia's henchmen. Garcia paid Gonzalez $700 for his work. Gonzalez stayed with Garcia through August of 1988. In September of 1988 he began working for the DEA.

Gonzalez's testimony was corroborates in part by Carlos Gomez, who testified at trial as a government witness. Gomez testified that Garcia used Gomez's ranch as a site for loading marijuana into the secret compartment of Garcia's trailer ten or twelve times between January and August 1988. Gomez also verified that Perez brought marijuana to the ranch on two or three occasions and that Gonzalez had been at the ranch to load marijuana with Garcia's men on one occasion.

2. The Second Conspiracy

Gonzalez testified that, near the end of his association with Garcia, Garcia became upset with his cousins, the brothers Guadalupe, Baldemar, and Rogelio Bermea. Garcia told Gonzalez that the Bermeas had stolen his secret compartment design and built their own trailer with a secret compartment and that he was afraid that the Bermeas would get caught by law enforcement officers and thus ruin the usefulness of his design.

Gonzalez was recruited to be a driver for the Bermeas by Guadalupe and Baldemar Bermea in October of 1988. He went to a ranch, apparently owned by Guadalupe and Baldemar Bermea, in late October or early November 1988. Some time later the Bermeas tractor-trailer arrived, and marijuana was brought to the ranch in a van by Perez and an unknown man. Perez told Gonzalez that he and Garza had decided to start working

with the Bermeas because they could get a "cheaper rate" with the Bermea's than they could with Garcia. While Rogelio, Guadalupe and Baldemar Bermea kept a lookout, Gonzalez and others loaded marijuana into the secret compartment in the Bermeas' trailer, which Gonzalez described as identical to Garcia's compartment. The next day Gonzalez left the ranch driving the trailer. He contacted the DEA agents with whom he had been working, and the agents arrested Rogelio Bermea, who was following Gonzalez in a separate vehicle, along the way Gonzalez continued with the shipment and met Baldemar Bermea a little later, but Baldemar Bermea apparently abadoned Gonzalez when Texas state highway troopers began to follow Gonzalez. Eventually Gonzalez was "arrested" by the DEA and Hays County Sheriff's Department. He helped the law enforcement officers unload the marijuana, which turned out to weigh a little over 1300 pounds.

After Gonzalez turned the Bermeas' tractor-trailer over to the DEA he returned to the Bermeas' ranch and told them had left the tractor-trailer at a certain truck stop with the key under the floor mat. Guadalupe Bermea told him that the tractor-trailer was nowhere to be found and then paid him $500 and told him to "get lost for a while." Later, Baldemar Bermea told Gonzalez that Garza and his brother had put a price on his head.

Another government witness Juan Teodosa Solis, who testified to the following events. Solis was recruited by Rogelio Bermea to drive a second tractor-trailer with a secret compartment in January 1989. Solis drove three shipments of marijuana for the Bermeas successfully, and Perez accompanied him on each of these trips. On the second trip, Solis overheard Perez talking to someone on the phone that he referred to as "Honorio." Additionally, while Solis was working for the Bermeas, he was told by Guadalupe Bermea that Rogelio and Baldemar Bermea were making plans with "Honorio" to transport another load of marijuana. On a fourth trip, in early March

1989, Solis was arrested, and it appears that he pleaded guilty to federal drug charges and was sentenced to seventy months in prison. A DEA agent testified at trial that Solis was transporting about 1100 pounds of marijuana at the time he was arrested.

B. Procedural History

The final superseding indictment against the appellants contained four counts. The first count charged that from December 1987 through July 1988, Perez, Garcia, Garza, Avalos, Pedraza, Rodriguez, and two others not before this court conspired to possess more than 100 kilograms of marijuana with intent to distribute in violation of 21 U.S.C. 846, 841(a)(1), and 841(b)(1)(B). The second count charged that from November - through May 1989, Perez, Garza, Rogelio Bermea, Baldemar Bermea, Guadalupe Bermea, and two others not before this court conspired to possess more than 100 kilograms of marijuana with the intent to distribute, also in violation of 21 U.S.C. 846, 841(a)(1), and 841(b)(1)(B). The third count charged Perez, Rogelio Bermea, Baldemar Bermea, Guadalupe Bermea, and two others not before this court with possession of between 100 and 1000 kilograms of marijuana with the intent to distribute on or about November 16, 1988, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and 18 U.S.C. § 2. The final count charged Perez, Rogelio Bermea, Baldemar Bermea, and Guadalupe Bermea with possession of between 100 and 1000 kilograms of marijuana with the intent to distribute on or about March 3, 1989, also in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B), and 18 U.S.C. 2.

After a two-week trial, the jury returned its verdicts. Perez was found guilty on counts one, two, and three and was found not guilty on count four. Garza was found guilty on counts one and two. Garcia, Avalos, Perez and Rodriguez were found guilty on count one. Rogelio and Guadalupe Bermea were found guilty on counts two, three, and four. Baldemar Bermea was found guilty

on count two and was found not guilty on counts three and four.

The appellants were sentenced under the sentencing guidelines to terms of imprisonment as follows. Perez, Garcia, Garza, and Rogelio Bermea were sentenced to 151 months. Guadalupe Bermea was sentenced to 135 months. Avalos was sentenced to 108 months. Baldemar Bermea was sentenced to 100 months. Pedraza was sentenced to 97 months and Rodriguez was sentenced to 92 months. An additional term of four years supervised release was imposed on each appellant as well. These appeals followed.

II. SUFFICIENCY OF THE EVIDENCE

[1] Several of the appellants have raised claims that the evidence was insufficient to support the jury verdicts. The scope of our review of the sufficiency of the evidence after conviction by a jury is narrow. We must affirm if a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. *United States v. Mergerson,* 4 F.3d 337, 341 (5th Cir.1993), *cert. denied,* - U.S. -, 114 S.Ct. 1310, 127 L.Ed.2d 660 (1994). We must consider the evidence in the light most favorable to the government, including all reasonable inferences that can be drawn from the evidence. *United States v. Pigrum,* 922 F.2d 249, 253 (5th Cir.), *cert. denied,* 500 U.S. 936, 111 S.Ct. 2064, 114 L.Ed.2d 468 (1991). The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence. *Id.* at 254.

A. OFFENSE ELEMENTS AND PAID INFORMANTS

[2-4] The sufficiency challenges raised in this appeal appear to be limited to the conspiracy convictions. In order to prove that a defendant committed the crime of conspiracy to possess narcotics with intent to distribute, the government must prove that (1) a conspiracy to possess narcotics with intent to distribute existed, (2) the defendant knew of the conspiracy, and (3) the defendant voluntarily participated in the conspiracy. *United States v. Hernandez-Palacios,* 838 F.2d 1346, 1348 (5th Cir.1988); *see United States v. Cardenas,* 9 F.3d 1139, 1157 (5th Cir.1993), *cert. denied,* - U.S. -, 114 S.Ct. 2150, 128 L.Ed.2d 876 (1994). No proof of an overt act is required. *Hernandez-*

Palacios, 838 F.2d at 1348; *Cacace v. United States*, 590 F.2d 1339, 1340 (5th Cir.1979); *United States v. Palacios*, 556 F.2d 1359, 1364 n. 9 (5th Cir.1977). *But see United States v. Shabani* 993 F.2d 1419 (9th Cir.1993) (holding that the elements of a drug conspiracy under 21 U.S.C. § 846 do include an overt act requirement), *cert. granted*, - U.S. - 114 S.Ct. 1047, 127 L.Ed.2d 370 (1994). Among the factors that may be considered by the factfinder in determining whether a defendant is guilty of committing a drug conspiracy crime are "concert of action," presence among or association with drug conspirators, and "[e]vasive" and erratic behavior." *Cardenas*, 9 F.3d at 1157. Of course, mere presence or association alone cannot suffice to establish that a person has voluntarily joined a conspiracy. *United States v. Magee*, 821 F.2d 234, 239 (5th Cir.1987).

[5] The government's evidence at trial consisted largely of the testimony of Jaime Gonzalez, who was a paid informant, Carlos Gomez, who had reached an agreement to cooperate with the government in exchange for dismissal of an indictment against his wife and who was paid for his expenses in testifying, and Juan Solis, who testified that he had been offered a reward if he cooperated in future civil forfeiture proceedings brought by the government. Although the credibility of witnesses who receive consideration in exchange for their cooperation or testimony may suffer from that fact, we have concluded that "it is up to the jury to evaluate the credibility of a compensated witness." *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir.1987) (en banc) (overruling *Williamson v. United States*, 311 F.2d 441 (5th C~ir.1962), *cert. denied*. 381 U.S. 950, 85 S.Ct. 1803, 14 L.Ed.2d 724 (1965)), *cert. denied*, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988). We have cautioned that procedural safeguards should be observed when paid informant testimony is used by the government. The government must not use or encourage the use of perjured testimony; the government must completely and timely disclose

the fee arrangement to the accused in accordance with *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); the accused must be given an adequate opportunity to cross-examine the informant and government agents about any agreement to compensate the witness; and the trial court should give a special jury instruction pointing out the suspect credibilityty of paid witnesses. *Cervantes-Pacheco,* 826 F.2d at 315-16. We note that the district court did give such a cautionary jury instruction, and that no defendant complains that he was not allowed to conduct adequate cross-examination regarding any agreements between the government and its witnesses.

With these rules in mind, we evaluate the appellants' insufficiency claims.

B. MANUEL GARCIA

[6, 7] Garcia's claim that the evidence was insufficient to sustain his conspiracy conviction is without merit. His argument amounts to little more than an attack on the credibility of Gonzalez and Gomez because these government witnesses received consideration from the government in exchange for their cooperation and testimony. We have repeatedly stated that the jury is the final arbiter of the credibility of witnesses. *United States v. Restrepo,* 994 F.2d 173, 182 (5th Cir.1993). We have held that a guilty verdict may be sustained if supported only by the uncorroborated testimony of a coconspirator, even if the witness is interested due to a plea bargain or promise of leniency, testimony is incredible or insubstantial on its face. *United States v. Gadison,* 8 F.3d 186, 190 (5th Cir.1993); *United States v. Hernandez,* 962 F.2d 1152, 1157 (5th *Cir.1992).* Testimony is incredible as a matter of law if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature. *Gadison* 8 F.3d at 190; *United States v. Hoskins,* 628 F.2d

295, 297 (5th Cir.) cert. denied, 449 U.S. 987, 101 S.Ct. 406, 66 L.Ed.2d 249 (1980).

The testimony of Gomez and Gonzalez was not incredible or insubstantial on its face. Indeed, Gomez's testimony tended to corroborate Gonzalez's testimony regarding the loading of Garcia's grain trailer at Gomez's ranch in July 1988. A reasonable jury could have credited their testimony, which included Garcia as an important member of the first conspiracy. We therefore reject Garcia's claim.

C. HONORIO GARZA

Garza was convicted of both conspiracies alleged in the indictment. The evidence adduced against him at trial consisted of the following:

[8] With respect to the first conspiracy, Gonzalez testified that Garcia told him and Garcia's other workers that "Matilde and Honorio" were going to bring them "a load" a few days before the load of marijuana actually arrived at Gomez's ranch. Garza was present at Gomez's ranch during the day before the the loading operation commenced, but Gonzalez did not testify that Garza was present during the loading. Gonzalez also testified that Garcia told him that Garza and Perez were the sources of the marijuana. Garza was identified as accompanying Ruben to Shorty Pedraza's home in Giddings, where Ruben picked up 600 pounds of marijuana and paid Garza an indeterminate amount of money from a briefcase. Garza points out that Gonzalez's testimony is somewhat unclear regarding this transaction; although Gonzalez testified that the transaction occurred in Giddings, the prosecutor's questions strangely begin to refer to a "man in New Braunfels[, Texas]" in the middle of Gonzalez's testimony. The prosecutor may have been referring to the buyer that Gonzalez knew only as "Ruben," but the record does not explicitly draw a connection between the two references.

[9] With respect to the second conspiracy, Gonzalez testified as follows. Soon after Gonzalez went to work for the Bermeas, Perez and an unknown man delivered a van loaded with marijuana to Guadalupe and Baledemar Bermea's ranch. Gonzalez talked with Perez after the marijuana was unloaded, and Perez told Gonzalez that he and his "compadre" Honorio had decided to start using the Bermeas because they had a cheaper rate. After Gonzalez turned the Bermeas' trailer over to law enforcement officers, Baldemar Bermea told him that "Los Nencos," a nickname for Garza and his brother, had put a price on Gonzalez's head. Witness Solis also connected Garza to the second conspiracy in his testimony. Solis testified that he overheard Perez talking on a phone to "Honorio" during two of Solis's trips as a driver for the Bermeas. Perez told Solis that he was calling people in "the Valley" to assure them that everything was going smoothly. On another occasion Solis was told by Guadalupe Bermea that Rogelio and Baldemar Bermea were making plans with Garza for another run.

The evidence was clearly sufficient to support a finding that Garza was guilty as to the first conspiracy; Gonzalez's testimony specifically tied Garza to the drug transaction conducted in Giddings. Although the evidence tying Garza to the second conspiracy is significantly weaker, we have held that "[o]lnly slight evidence is needed to connect an individual to an illegal conspiracy once the United States has produced evidence of that conspiracy." *United States v. Vaquero,* 997 F.2d 78, 82 (5th Cir.) (citing *United States v. Duncan,* 919 F.2d 981, 991 (5th Cir.1990), *cert. denied,* 500 U.S. 926, 111 S.Ct. 2036, 114 L.Ed.2d 121 (1991)), *cert. denied,* - U.S. - 114 S.Ct. 614, 126 L.Ed.2d 578 (1993). The United States more than sufficiently proved the existence of the second conspiracy; the evidence connecting Garza to that conspiracy, although not overwhelming, sufficiently supports the interference that he was involved in that conspiracy in a somewhat removed position of authority.

D. ENRIQUE AVALOS

[10] Avalos challenges the sufficiency of the evidence to support his conviction for participation in the first conspiracy. His protests that the evidence shows "mere presence" at the scene of conspiratorial activity, however, are without merit. Gonzalez testified not only that Avalos was often present at Garcia's ranch, but also that Avalos was Garcia's closest associate. Additionally, Avalos was identified by Gonzalez as one of the men who helped load the marijuana into the secret compartment in Garcia's grain trailer at Gomez's ranch in July of 1988 and who helped unload the marijuana at Shorty Pedraza's home. Like his co-appellants, Avalos makes much of the fact that the government's main witnesses were paid or otherwise compensated for their testimony and cooperation, but this fact was for the jury to consider in weighing the credibility of the witnesses. We will not second-guess the jury's determination.

E. TEODORO PEDRAZA

[11] Although the government's evidence against Teodoro Pedraza was not as extensive as its evidence against some of his codefendants, we conclude that Pedraza's sufficiency challenge is also without merit. Gonzalez identified Pedraza as one of the men who converged at Shorty Pedraza's home and helped unload the marijuana from Garcia's trailer. Gonzalez also testified that Pedraza was part owner of the truck used during the first conspiracy and that Pedraza and Garcia argued on one occasion when Pedraza wanted Garcia to finish paying Pedraza for the truck. Thus, Gonzalez's testimony, if believed, established more than Pedraza's mere presence at the scene of conspiratorial activity. Pedraza's complaint that the jury could not have rationally convicted him and at the same time acquitted Shorty Pedraza is without merit. *See United States v. Zuniga-Salinas,* 952 F.2d 876, 877 (5th Cir.1992) (en banc) (holding that a verdict

convicting one alleged conspirator can stand even if the jury acquits the sole alleged coconspirator). Because a rational jury could have found that Pedraza actively participated in the first conspiracy, we conclude that the evidence supporting his conviction was sufficient.

F. LORENZO RODRIGUEZ

[12] Rodriguez's argument that the evidence implicating him in the first conspiracy was insufficient to support his conviction is without merit. Gonzalez's testimony established Rodiiguez's frequent presence at Garcia's ranch before the July 1988 marijuana shipment as well as Rodriguez's participation in both the loading of marijuana into Garcia's trailer at Gomez's ranch and the unloading of the marijuana at Shorty Pedraza's home near Giddings. Gomez also testified to Rodriguez's presence at his ranch when the July 1988 shipment was loaded into Garcia's trailer. The fact that Gonzalez and Gomez generally referred to Rodriguez as "Lencho," the name listed in the indictment as an "a/k/a" for Rodriguez, does not reduce the evidentiary weight of their testimony or in-court identifications of Rodriguez, as Rodriguez seems to argue.

G. ROGELIO BERMEA

[13] Rogelio Bermea contends that the district court erred in denying his motion for acquittal because the evidence was insufficient to distinguish him from his relatives who were also on trial. We disagree. According to Gonzalez, Rogelio Bermea was present at the Bermea ranch when marijuana was loaded into the truck that Gonzalez was to drive, and Rogelio Bermea also met Gonzalez at a convenience store during the shipment. Witness Solis also affirmatively identified Rogelio Bermea as the person who recruited him to drive loads of marijuany for the Bermeas and opined that Rogelio Bermea was the "boss man" of the conspiracy. This evidence, taken as a whole, was sufficient

to support Rogelio Bermea's conspiracy conviction.

H. BALDEMAR BERMEA

[14] Baldemar Bermea's sufficiency of the evidence challenge, like that of the other appellants, is without merit. He was convicted only for his membership in the second conspiracy alleged in the indictment. Gonzalez connected Baldemar Bermea to the conspiracy by testifying that he was recruited by Guadalupe and Baldemar Bermea, that Baldemar Bermea accompanied him part of the way during the shipment that he drove and tried to warn him that Texas highway patrol officers were following him, and that Baldemar Bermea was the person who warned him that a price had been put on his head. Although Gonzalez's in-court identification of Baldemar Bermea was not recognized by the district court and is thus not clear to this court on appeal, Solis did make a clear in-court identification of Baldemar Bermea. Solis's testimony also established Baldemar Bermea's testimony involvement in the second conspiracy. According to Solis, Baldemar Bermea went with him to pick up the truck that Solis used to transport marijuana and occasionally contacted him when there was load of marijuana ready to be shipped. Baldemar Bermea also assured Solis that if he were arrested, the Bermeas would help him and his family financially. The evidence against Baldemar Bermea was sufficient to support his conviction.

III. MIDTRIAL PUBLICITY

Garcia and Garza contend that they are entitled to reversal of their convictions because they were unfairly prejudiced by extensive publicity that occurred during the trial.

A. FACTS

Most of the publicity complained of by Garcia and Garza consisted of articles pubilished in a local newspaper, the *McAllen Monitor*. The

trial lasted from January 15-29, 1992. On Saturday, January 18, the *Monitor* ran a story entitled "Official's drug trial underway," detailing Gonzalez's testimony and describing the case as one "involving former Starr County Constable Honorio Garza and 11 other defendants." The next article cited by Garza and Garcia was entitled "Witness details drug ring operation" and summarized Gomez's testimony. The next article was entitled "Testimony implicates constable," and it detailed the testimony of Solis, including his belief that Perez contacted Garza by telephone during marijuana shiments. On January 23, the *Monitor* ran an article entitled "Witness says he was offered bribe not to testify." The article briefly described testimony by Solis under cross-examination by Garza's attorney that Solis's brother had come to visit Solis in Starr County jail in September of 1991 and told Solis that he was sent by Garza to offer him money not to testify. The next article was entitled "Jurors allowed to see evidence over objections." The article stated that income records, weapons, cash, and jewelry had been seized in raids on the homes of some of the dendants and that the trial judge had admitted some of the articles into evidence. Relying in part on a statement by the lead prosecutor, the article further stated that one of the defendants, Eleazar Bermea, had pleaded guilty to misprision of a felony and stated in the plea agreement that "he knew there was a marijuana-trafficking conspiracy, that he allowed his home to be used for telephone conversations between conspirators, and he did not alert authorities about criminal acts." Two other articles complained of describe the final day of testimony in the case and mention in passing that jury deliberations had begun.

The other source of the publicity complained of by Garcia and Garza was an episode of the nationally televised news program *Street Stories* that aired the evening of January 23, 1992, in the midst of the trial. Garza has provided a transcript of that episode to this court in his record excerpts. A segment of that episode

focused on the marijuana smuggling trade in the Rio Grande Valley, referring specifically to Starr County as a "smuggler's paradise" and including footage of an unidentified informant who asserted that forty percent of Starr County's law enforcement personnel were involved in the drug trade. Apparently photographs of Garza were included in the segment, and the program reported that Garza had been indicted and that his trial was pending. The appellants also claim that Garza was shown on the program in handcuffs, although this cannot be verified from the transcript.

The district judge made some efforts to discourage the jurors from viewing any media accounts bearing on the case. In the preliminary instructions to the jury before trial, the judge gave the following admonition to the jury: "Don't read or listen to anything about this case." Before adjourning for lunch on January 23, the judge asked the jury as a whole if any jurors had "read or seen or listened to anything about th[e] case," and no juror responded. At the end of the day on January 23, the judge reminded the jurors, "Don't forget my instructions about newspapers, TV, radio or discussing the case with anybody." The judge did not, however, accede to the request for individual voir dire made by Garza's defense counsel. The *Street Stories* episode was brought to the judge's attention the next morning before trial resumed, and at the end of the day the judge gave the following admonition:

> I've also given you some instructions about not to read anything about the case, not to hear anything about the case, not to watch anything about the case, not to do any investigation on your own about a case-about the case and not to discuss it with anybody. If through some inadvertence you have seen something about the case or you have read something about it but you-you're clearly not to do that in any way. You cannot consider anything that is not evidence, that has not

> been presented here in the Courtroom, ladies and gentlemen. And you're under oath to follow the instructions I give you with regard to that.

After some additional prompting by Garza's defense counsel, the judge asked, "None of you have seen or heard anything about this particular case or any defendant in this case recently, have you?" The record reflects that there was no audible response to the judge's question, and he dismissed the jury for the day.

Before the jury was brought into the courtroom on January 27, Garcia's attorney raised the *Monitor* article regarding the property seized during the government raids and the statement given by Eleazar Bermea in conjunction with his guilty plea, and Garza's attorney moved for a mistrial, which the court denied. When the jury was brought in that morning, the judge asked, "Ladies and gentlemen, is there anybody who has seen, read or heard anything about this case since you all were here on Friday?" After getting no audible response, the judge reminded the jury not to forget the instructions he had given, and the trial proceeded. It appears that the judge did not give any final instructions related to the publicity except for general instructions that the jury should restrict its deliberations to the evidence admitted in the case.

Garza argues that the district court should have granted a mistrial because of prejudice stemming from the midtiial publicity, that the district court committed reversible error in failing to conduct midtrial voir dire regarding the publicity, and that the district court committed reversible error for failing to sequester the jury sua sponte. Garcia generally presses the same points.

B. ANALYSIS

[15] The management of midtrial publicity is entrusted to the broad discretion of the district court; we will reverse onlv if we find an abuse

of discretion. *United States v. Aragon*, 962 F.2d 439, 443 (5th Cir.1992); *United States v. Harrelson*, 754 F.2d 1153, 1163 (5th Cir.), *cert. denied*, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241, and *cert. denied*, 474 U.S. 1034, 106 S.Ct. 599, 88 L.Ed.2d 578 (1985).

1. Refusal to Conduct Individual Voir Dire

We consider first the argument that the district judge committed reversible error by failing to voir dire the jurors individually after the instances of midtiial publicity were brought to the court's attention. There is a paucity of Supreme Court authority on the subject of midtrial publicity. The more celebrated cases dealing with the adverse effects of publicity, *e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), have involved convictions obtained after massive pretrial publicity and frequently a pervasive media presence during the trial as well. The instant case is not one like Sheppard and its kind, as it does not involve a "conviction obtained in a trial atmosphere that had been utterly corrupted by press coverage." *Murphy v. Florida*, 421 U.S. 794, 798, 95 S.Ct. 2031, 7035, 44 L.Ed.2d 589 (1975). In *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959) (per curiam), the Court exercised its supervisory power over the enforcement of the criminal law in the federal courts and reversed a conviction because the jurors had been exposed to two newspaper accounts of the defendant's criminal record. The district judge in *Marshall* conducted individual voir dire of the jurors in his chambers and concluded that the defendant would not be prejudiced by the publicity because even the jurors who had read one or both of the prejudicial articles said that they could be impartial in deciding the case. *Id.* at 312, 79 S.Ct. at 1172-73. The Court, although recognizing the district judge's broad discretion in ruling on the possibility of prejudice from the publicity, reversed the conviction and

granted a new trial. *Id.* at 312-13, 79 S.Ct. at 1172-73.

[16] Although the Supreme Court has not set down many guidelines for resolving the problem of midtrial publicity, we have considered the issue several times in recent years. Our touchstone is *United States v. Aragon*, 962 F.2d at 443-47, in which we undertook a thorough review of our cases regarding midtrial publicity. The test, reduced to its most basic elements, is twofold: voir dire is required if there are serious questions of possible prejudice, considering (1) whether the publicity is innately prejudicial, and if so (2) the probability that the publicity in fact reached the jury. *Id.* at 443-44. In determining whether publicized material is innately prejudicial, we consider factors such as the content of the material, the timing of the publicity in relation to critical stages of the trial, and the possible effects of the material on legal defenses. *Id.* at 444. The second prong is governed by commonsense considerations such as the prominence of the media coverage and the nature, number, and regularity of the district court's warnings against viewing the coverage. *Id.* The test is necessarily highly fact-specific. *Id.* (citing Marshall 360 U.S. at 312, 79 S.Ct. at 1172-73). We have held district courts to a stricter standard in mid-trial publicity cases as compared to pre-trial publicity cases because information reported during the trial is more likely to remain in the mind of a juror exposed to it. *Id.* at 441 n. 3 (citing *United States v. Williams*, 568 F.2d 464, 468 (5th Cir.1978)).

a. Nature of the Publicity

[17] We first consider whether the publicized material complained of by the appellants was innately prejudicial. In *Aragon*, we reaffirmed the rule that publicity revealing to jurors a defendant's prior criminal record is inherently prejudicial. *Id.* (citing *Williams*, 568 F.2d at 469). We also concluded that a media

account was innately prejudicial in the leading case of *United States v. Herring,* 568 F.2d 1099 (5th Cir. 1978). In that case, Herring was on trial for various drug offenses. *Id.* at 1100 n. 3. Herring was a road manager for noted rock musician Gregg Allman, and Allman testified at trial against Herring in exchange for a grant of immunity. *Id.* at 1100. The local daily newspaper carried a front-page story, complete with photograph, entitled "ALLMAN UNDER HEAVY GUARD"" and subtitled "Death Threats Reported." *Id.* at 1102. We concluded that this material, released on the very day the defendant took the stand, was innately prejudicial and demanded full voir dire of the jurors. *Id.* at 1105. Finally, in *United States v.* Williams, 809 F.2d 1072, 1091-92 (5th Cir.), *modified,* 828 F.2d 1 (5th Cir.), *cert. denied,* 484 U.S. 896, 108 S.Ct. 228, 98 L.Ed.2d 187 *and cert. denied,* 484 U.S. 913, 108 S.Ct. 259, 98 L.Ed.2d 216, *and cert. denied,* 484 U.S. 987, 108 S.Ct. 506, 98 L.Ed.2d 504 (1987), we considered midtrial publicity stemming from a government witness's testimony that certain defendants accused of drug offenses were involved in drug dealing even during the trial. This testimony led the trial judge to revoke bail, leading to numerous media accounts of the event, including front page coverage complete with a color photograph of the defendants being led away from the courthouse in chains. *Id.* at 1091. We concluded that the nature of the material "definitely [went] beyond the record and raise[d] serious questions of possible prejudice." *Id.* at 1092.

Most of the publicity that occurred in the instant case was not exceptionally prejudicial; as the district court noted, most of the newspaper accounts were limited to descriptions of the trial proceedings witnessed by the jurors themselves. *See United States v. Moncivais,* 14 F.3d 1030, 1037 (5th Cir.1994) (finding that publicity carried no potential for prejudice because "the news media had merely publicized an issue that the jurors had already been informed of by the judge himself"), petition for *cert.*

filed, 62 U.S.L.W. 3844 (U.S. June 3, 1994) (No. 93-1933). Two specific instances of midtrial publicity, however, do cause us special concern. First, the newspaper account of Eleazar Bermea's plea agreement, and in particular its detailed recitation of Bermea's admissions regarding the existence and operations of a marijuana trafficking conspiracy, went well beyond what the district judge told the jurors: "Ladies and gentlemen, the case of Mr. Eleazar Bermea has been disposed of, and it will not be necessary for you to return a verdict of guiltv or not guiltv with regards to Mr. Bermea." We have made it abundantly clear that evidence about a coconspirator's conviction is not admissible as substantive proof of the guilt of a defendant. *United States v. Leach*, 918 F.2d 464, 467 (5th Cir. 1990), *cert. denied*, 501 U.S. 1207, 111 S.Ct. 2802, 115 L.Ed.2d 976 (1991); *see also United States v. Griffin*, 778 F.2d 707, 710 (11th Cir.1985) ("Due to the extreme and unfair prejudice suffered by defendants in similar situations, courts and prosecutors generally are forbidden from mentioning that a codefendant has either pled guilty or been convicted."). Indeed, we held in the *Leach* case that the government's introduction of evidence during Leach's trial that Leach's alleged coconspirator had pleaded guilty rose to the level of plain error and warranted reversal of one of Leach's convictions despite his failure to object. *Leach*, 918 F.2d at 468. Thus, the newspaper coverage of Eleazar Bermea's guilty plea and the details of his plea agreement was plainly prejudicial to the remaining defendants. The same article also mentioned certain items seized during a search of Garcia's house, including $110,000 in cash, twenty weapons, and jewelry, that the court had excluded from evidence. Second, the episode of *Street Stories* chronicled public corruption in Starr County and specificallv mentioned Garza in conjunction with other prominent Starr County residents who had pleaded guilty or already gone to prison for drug offenses. Although no explicit connection was made between these drug dealers, who included a justice of the peace and

a former county clerk, and Garza, Garza's name, photograph, and indicted status were included or described in the broadcast in close proximity to the persons who had pleaded guilty or already gone to prison. We conclude that these two instances of publicitv contained material that was innately prejudicial. *See Aragon,* 962 F.2d at 445 (suggesting that publicity is innately prejudicial if its substance "may be taken as probative of the appellants' guilt").

b. Probability of Jury Contamination

[18] Our analysis must next focus on the likelihood that the prejudicial accounts reached the jury. The most important factors, in our view, are the prominence of media coverage itself and the measures by the district court to minimize the probability of jury exposure. Lesser factors that we have recognized as bearing on the inquiry, include whether the jury returned mixed verdicts, which can indicate fair-minded consideration of the evidence, the length of trial, and the amount of detail provided to the district court regarding the extent and content of the publicity. *United States v. Faulkner,* 17 F.3d 745, 764-65 (5th Cir.1994), *cert. denied* - U.S. -, 115 S.Ct. 93, - L.Ed.2d - (1994).

First, we consider the nature of the publicity itself. All the articles, including the one containing the account of Eleazar Bermea's guilty plea, appeared prominently in what is apparently a leading daily newspaper in the city where the trial was held. As we have already noted, however, the great bulk of the publicity was not particularly prejudicial, and the portion of the article describing Eleazar Bermea's guilty plea consisted of only three short paragraphs in the middle of a longer article. *See United States v. Manzella, 782* F.2d 533, 541 (5th Cir.) (rejecting a claim based on midtrial publicity in part because the media discussion of a defendant's prior conviction "occupied but one short paragraph in a lengthy article"), *cert. denied,* 476 U.S. 1123, 106 S.Ct.

1991, 90 L.Ed.2d 672, and *cert. denied,* 479 U.S. 961, 107 S.Ct. 457, 93 L.Ed.2d 403 (1986). The television program, of course, aired nationally and could have been seen by any of the jurors. On balance, it appears that the prejudicial television broadcast was widely and freely disseminated in a manner likely to reach some jurors, while the prejudicial newspaper story was probably not as likely to come to their attention. *Cf. Aragon,* 962 F.2d at 441-42 (reversng a conviction based on a single article printed conspicuously on the front page of the most widely circulated local daily newspaper); *Williams,* 809 F.2d at 1091-92 (reversing a conviction based on publicity including one front-page newspaper story with photograph and reports on "local television and radio news programs").

The other critical factor in weighing the probability that the jury was exposed to the prejudicial publicity is the procedure adopted by the district judge to shield the jury from the publicity. The cases place great emphasis on the particular instructions given to the jury by the trial judge to minimize or eliminate the danger of jury contamination by prejudicial publicity. For instance, we declined to reverse convictions due to midtrial publicity in *Faulkner,* 17 F.3d at 764, in part because the judge gave preliminary jury instructions regarding the need to avoid press reports which were "unusually lengthy and emphatic," rather than "boilerplate or casual recitations of standard jury instructions." *Faulkner* involved a television newscast on the first day of trial that erroneously reported that the defendants' first trial had ended in a mistrial caused by jury tampering. *Id,* at 763. We noted with favor the judge's decision to give the jurors an immediate explanation of the real reason for the prior mistrial, which was a hung jury, directly rebutting the allegedly prejudicial statement in the press report. *Id.* at 764. Another approach we have favored is the giving of a blanket instruction to the jury not to view or listen to any radio or television news

broadcasts or to read any newspapers except as provided by the court, and then to provide newspapers with any relevant portions redacted from them. *Aragon*, 962 F.2d at 445; *Harrelson*, 754 F.2d at 1163.

[19] The procedures followed by the district judge in the instant case, however, do not precisely match those used in any of the precedents cited above. The judge did instruct the jury at the outset and occasionally throughout the trial not to read or listen to any media accounts of the case, an instruction we have favored over the weaker instruction simply to pay no attention to such accounts. *Herring*, 568 F.2d at 1105. The frequency of the jury admonitions is also factor we have considered in deciding whether an abuse of discretion has occurred. *Faulkner*, 17 F.3d at 765. In *Aragon*, we reversed appellants' convictions due to mid-trial publicity, in part because "a selective prohibition against reading *about the case*, done rather quickly and casually by the court, did not obviate the court's need for inquiry." *Aragon*, 962 F.2d at 445 (emphasis added). In the instant case, the district judge apparently did not repeat his cautionary instructions each day of the trial, despite the fact that newspaper accounts of the trial appeared several times while the trial was in progress. We observe, however, that the judge did repeat his instructions on a few occasions; significantly, he reminded the jury not to forget his "instructions about newspapers, TV, radio, or discussing the case with anybody" just before dismissing the jury the very day the prejudicial television program aired. We presume that a jury heeds its instructions. *United States v. De La Rosa*, 911 F.2d 985, 992 (5th Cir.1990), cert. *denied*, 500 U.S. 959, 111 S.Ct. 2275, 114 L.Ed.2d 726 (1991).

Additionally, even though the district judge did not conduct individual voir dire regarding the publicity, he asked the jury as a whole three times if anyone had been exposed to media

coverage of the case. Two of those inquiries were made immediately following the two instances of innately prejudicial publicity that we have already identified, so any contamination would have been fresh in the minds of any jurors that had been exposed to those accounts. The fact that none of the jurors responded to the judge's direct questions strongly suggests that no contamination in fact occurred.

The other factors recognized in the cases have little bearing on this case. Two defendants were wholly exonerated, and Perez and Baldemar Bermea were acquitted on one and two counts of marijuana possession, respectively. Although these mixed verdicts arguably weigh against finding an abuse of discretion in the judge's refusal to conduct individual voir dire, *Faulkner*, 17 F.3d at 764-65, any force this factor might ordinarily carry is substantially diminished in the instant case by the fact that Garcia and Garza, the only defendants to complain about the midtrial publicity, were not acquitted of any charges. The two-week length of the instant trial does not militate strongly for or against reversal, falling as it does between the extremes of the *Aragon* case, in which the problematic publicity occurred in the middle of a two-day trial, and the *Faulkner* case, in which the prejudicial broadcast occurred on the first day of a seven-week trial.

This is a close case, and the more prudent course would have been for the district judge to conduct the requested voir dire and perhaps to provide the jurors with newspapers to read each day with all references to the case expurgated from them. Considering all of the circumstances, however, we conclude that the likelihood of actual jury exposure to the innately prejudicial publicity was so low as to require the conclusion that no abuse of discretion occurred. The most significant fact distinguishing this case from *Aragon* and the other cases finding reversible error is that the district judge did conduct a sort of collective voir dire after both instances of innately prejudicial publicity. The negative

response he received on each occasion strongly indicates that jury exposure did not occur in this case and supports his discretionary decision that individual voir dire was unnecessary.

We have found nothing in our cases to support a rule that midtrial publicity requires individual voir dire even after the district judge has made a collective inquiry to the jury and received no positive response. Indeed, in *United States v. Capo,* 595 F.2d 1086, 1092-93 (5th Cir.1979), *cert. denied,* 444 U.S. 1012, 100 S.Ct. 660, 62 L.Ed.2d 641 (1980), we rejected a midtrial publicity claim, basing our decision in part on a collective voir dire of the jury by the court after the publicity was brought to the court's attention. As *Manzella* illustrates, there is no reason to presume, as Garcia and Garza implicitly would have us do, that jurors would conceal their exposure to media coverage from a direct inquiry by the trial judge. *Manzella,* 782 F.2d at 541-42 (approving the trial judge's decision to perform collective voir dire first and then to voir dire individually only the three jurors who indicated they had seen the publicity). Because the collective voir dire indicated that no jury contamination occurred, and because independent factors in this case exist that minimize the likelihood of contamination such as the district judge's instructions to the jury and the obscurity of the prejudicial newspaper account, the district court acted within its discretion in not performing a more searching examination of the jurors individually. See *United States v. Hyde,* 448 F.2d 815, 848 n. 38 (5th Cir.1971) ("[W]hen there has been publicity that would possibly prejudice defendant's case if it reached the jurors, the court should first ask the jurors what information they have received. Then it should ask about the prejudicial effect and it should make an independent determination whether the juror's impartiality was destroyed."), *cert. denied,* 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972); *see also United States v. Davis,* 583 F.2d 190, 196-98 (5th Cir.1978) (finding an abuse

of discretion because the trial judge was aware that *all* the jurors had been exposed to media coverage and still performed only cursory collective voir dire asking whether any panel member felt that his impartiality had been impaired). The precautions taken by the district court were sufficient to dispel any serious questions about possible prejudice.

2. Sequestration and Mistrial

[20, 21] Garza also contends that the district court committed reversible error by denying his motion for a mistrial due to the midtrial publicity and by failing to order sequestration of the jury sua sponte. This court will reverse a district court's refusal to grant a mistrial only if an abuse of discretion has occurred. *United States v. Limones*, 8 F.3d 1004, 1007 (5th Cir.1993), *cert. denied*, - U.S. -, 114 S.Ct. 1543, 128 L.Ed.2d 194, and *cert. denied*, - U.S.-, 114 S.Ct. 1562, 128 L.Ed.2d 209 (1994). We have already determined that the district court's decision not to conduct individual voir dire in connection with the midtrial publicity was not an abuse of discretion. By the same token, the court's decision not to declare a mistrial based on the identical publicity was not an abuse of discretion.

[22-24] Garza argues that the district court should have sua sponte ordered sequestration of the jury. His failure to request this measure in the district court requires him to show that the court's failure constitutes plain error. FED.R.CRIM.P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). The Supreme Court has stated that the courts of appeals "should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Olano*, - U.S. -, 113 S.Ct. 1770, 1779, 123 L.Ed.2d 508 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555

(1936)); *see* Jeffrey L. Lowry, Note, *Plian Error Rule-Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J.CRIM.L. & CRIMINOLOGY 1065, 1072-75 (1994) (discussing the Court's opinion in *Olano*). This is a heavy burden, and one that we conclude Garza has not met. It is well-known that sequestration is one of the most burdensome tools of the many available to assure a fair trial. *United States v. Greer*, 806 F.2d 556, 557 (5th Cir.1986). Even when error has been preserved, the defendant complaining of a refusal to sequester must demonstrate a substantial likelihood of prejudice flowing from the reversal to sequester before we can find an abuse of discretion. *Id.* at 557-58.

Given our conclusion that the district court's handling of the midtrial publicity was not an abuse of discretion, we cannot conclude that the court's failure to sequester the jury sua sponte rose to the level of plain error.

IV. EVIDENTIARY RULINGS

[25] Garcia contends that two of the district court's evidentiary rulings constituted reversible error. First, he argues that the court erred by admitting extrinsic offense evidence at trial. The district court's decision to admit extrinsic offense evidence under Federal Rule of Evidence 404(b) will not be disturbed absent a clear showing of abuse of discretion. *United States v. Bruno, 809* F.2d 1097, 1106 (5th Cir.), *cert. denied*, 481 U.S. 1057, 107 S.Ct. 2198, 95 L.Ed.2d 853 (1987).

[26] The extrinsic offense evidence complained of by Garcia consisted of certain testimonv by Gonzalez that tended to show that Garcia had been involved in cocaine trafficking with at least some of the Bermeas prior to the summer of 1988. The substance of this testimony was that Gonzalez encountered Guadalupe Bermea in a bar in the summer of 1988. Guadalupe Bermea complained to Gonzalez that Garcia would not give him $500 that he really needed after he, Baldemar

Bermea, and their cousin, Tonio, had made Garcia a millionaire. Gonzalez asked Guadalupe Bermea what he meant, and Bermea responded that he, Baldemar Bermea, and Tonio had helped Garcia ship 2400 "ki's" of cocaine to Los Angeles. Later, Gonzalez asked Garcia about the cocaine trafficking, and Garcia confirmed Guadalupe Bermea's story. Garcia told Gonzalez that Avalos had concealed the cocaine in the hull of a fiberglass boat, Villarreal had driven the boat to Los Angeles, and Guadalupe Bermea, Baldemar Bermea, and Tonio had also been involved. Before Gonzalez's testimony was elicited in the presence of the jury, the district judge conferred with the attorneys and heard Gonzalez's testimony out of the jury's presence. The judge overruled all objections to this testimony and administered a lengthy limiting instruction to the jury during the testimony to consider the evidence of a defendant's other violations of law only in determining "the motive, the opportunity, the preparation, the plan, the knowledge, the identity, and the state of mind or intent with which the defendant may have-the defendant did the act charged in the indictment."

[27] Federal Rule of Evidence 404(b) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]

We review alleged violations of Rule 404(b) under the two-pronged test of United *States v. Beechum*, 582 F.2d 898, 911 (5th Cir.1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). That test requires us to verify (1) that the evidence of extraneous conduct is relevant to an issue other than a defendant's character, and (2) that the evidence possesses

probative value that is not substantially outweighed by its undue prejudice and is otherwise admissible under Rule 403. *Id.*

[28, 29] Garcia focuses on the second *Beechum* prong, contending that Gonzalez's testimony about the cocaine trafficking was inadmissible because its prejudicial effect outweighed its probative value. We have held that the mere entry of a not guilty plea in a conspiracy case raises the material issue of intent sufficiently to justify the admissibility of extrinsic offense evidence. *United States v. Parziale*, 947 F.2d 123, 129 (5th Cir.1991), *cert. denied*, - U.S. -, 112 S.Ct. 1499, 117 L.Ed.2d 638 (1992); *United States v. Roberts*, 619 F.2d 379, 383 (5th Cir.1980). The second prong of the *Beechum* analysis inquires whether Rule 403 has been satisfied, *Beechum*, 582 F.2d at 913, and we must take care not to infringe upon the "broad discretion," *Parziale*, 947 F.2d at 129, of the trial court regarding the relevance, probative value, and prejudicial effect of exidence. Rule 403 tips the balance in favor of the admission of relevant evidence, permitting exclusion onlv if the evidence's probative value is *substantially* outweighed by the danger of unfair prejudice. As we observed in *Beechum*, similarity between the elements of the extrinsic offense and those of the charged offense may enhance the probative value of the extrinsic offense evidence. *Beechum*, 582 F.2d at 913. At the same time, a close resemblance between the extrinsic offense and the charged offense also increases the unfair prejudice to the defendant. *Id.* at 915 n. 20. It must also be remembered that the probative value of extrinsic offense evidence is not a constant; if the government already has a strong case on the issue of intent, the extrinsic offense evidence may add little to the government's case and should be excluded more readily. *Id.* at 914.

[30] Although Garcia discusses *Beechum* in his brief at length, he does not explain how *Beechum* or any other case offers him solace on the instant facts; his assertion that the

district court not only erred in performing the balancing test of Rule 403 but abused its discretion in so doing is wholly without factual support. We have frequently held in drug offense cases that evidence of a defendant's extrinsic drug offenses is admissible. *E.g., Parziale,* 947 F.2d at 129; *United States v. Harris,* 932 F.2d 1529, 1534 (5th Cir.), *cert. denied,* - U.S. -, 112 S.Ct. 270, 116 L.Ed.2d 223, *and cert. denied,* - U.S. -, 112 S.Ct. 324, 116 L.Ed.2d 265 (1991), *and cert. denied,* - U.S. -, 112 S.Ct. 914, 116 L.Ed.2d 814 (1992). A bald assertion that the probative value of extrinsic offense evidence was substantially outweighed by its prejudicial effect does not show an abuse of discretion by the district court. *Parziale,* 947 F.2d at 129.

[31,32] Garcia seems to argue that the district judge committed reversible error because he did not make a determination out of the jury's presence that Garcia committed the alleged extrinsic offense. This proposition is at odds with the Supreme Court's decision in *Huddleston v. United States,* 485 U.S. 681, 689, 108 S.Ct. 1496, 1501, 99 L.Ed.2d 771 (1988), in which the Court held that the Federal Rules of Evidence do not require a district court to make a preliminary finding of fact that an alleged extrinsic offense or act has been proved by the government by a preponderance of the evidence. If the court determines, after introduction of the evidence, that the jury could not reasonably find that the alleged extrinsic act occurred by a preponderance of the evidence, however, the court must instruct the jury to disregard the evidence. *Id.* at 690, 108 S.Ct. at 1501-02. Garcia does not challenge the weight of the evidence supporting the extrinsic cocaine conspiracy, he only challenges the lack of a preliminary finding by the court that the extrinsic conspiracy existed. Because such a finding is not required, challenge is without merit.

[33] Garcia also complains of the court's decision admitting certain evidence seized from his residence in April 1989, approximately nine

months after the end of the first conspiracy. The court admitted a document showing Pedraza to be the owner of a truck, an address book containing the names and telephone numbers of some of Garcia's codefendants, and a piece of paper listing names and telephone numbers including "Ruben" and "Onorio." The court did not, we note, admit certain other items that it deemed insufficiently connected to the case. We are unable to conclude that the district court's admission of this evidence constituted an abuse of discretion and therefore reject Garcia's contention.

V. PROSECUTORIAL MISCONDUCT

[34-36] Garcia, Garza, Perez, Rodriguez, and Rogelio Bermea contend that their convictions should be reversed because of prosecutorial misconduct. A criminal defendant bears a substantial burden when attempting to show that prosecutorial improprieties constitute reversible error. *United States v. Diaz-Carreon*, 915 F.2d 951, 956 (5th Cir.1990). Improper prosecutorial comments require reversal only if the comments substantially affected the defendant's right to a fair trial. *Id.* In evaluating any effect on the right to a fair trial, we consider three factors: the magnitude of the prejudicial effect of the remarks, the efficacy of any cautionary instruction, and the strength of the evidence of the defendant's guilt. *Id.* The misconduct complained of must be examined in the context of the trial in which it occurred. *United States v. Willis*, 6 F.3d 257, 264 (5th Cir.1993). After careful review of the conduct complained of by the defendants and the trial as a whole, we conclude that any misconduct did not substantially affect the defendants' right to a fair trial.

A. FACIAL EXPRESSIONS

[37] First, Rodriguez and Rogelio Bermea complain that the prosecutor acted sarcastically towards opposing counsel, and specifically that she made improper facial expressions to the jury

during cross-examination of government witnesses and during the defendants' closing argument. Only two exchanges between the court and the defense attorney are quoted in the defendants' briefs. In each case, although the court did not directly instruct the jury to disregard the prosecutor's facial expressions, the court did tell the prosecutor not to behave in that fashion. The court also observed that the prosecutor's behavior had actually "been very good in that score." The two isolated instances cited by the defendants, occurring as they did during a two-week trial, do not require reversal of the convictions.

B. CLOSING ARGUMENT

[38] More serious are the appellants' various charges that the prosecutor used improper closing arguments. The prosecutor must abide by certain limitations in making a closing argument; the prosecutor may not express a personal opinion on the merits of the case or on the credibility of the witnesses, nor may she misstate the jury's function or the burden of proof. *United States v. Cantu*, 876 F.2d 1134, 1138 (5th Cir.1989). We review the specific arguments complained of by the appellants.

[39, 40] Near the beginning of her rebuttal, the prosecutor stated,

> Now, Joe Martinez would have you believe that I'm some kind of plaintiff's attorney and I'm looking for money or something like that. Ladies and gentlemen, that's not my job. I represent the people of the United States of America. My job is to take narcotics traffickers off the streets.

Two defense attorneys immediately objected, and Perez's attorney moved for a mistrial, which the court denied. The court remarked that "all she's saying is that she represents the government here." Later, the prosecutor said that Garcia's

attorney "talked about 1692 and the Sixth Amendment and Bill of Rights. And touching and feeling and love. Ladies and gentlemen, what we have here is a drug conspiracy before you." Rodriguez and Rogelio Berrnea contend that this comment trivialized the law and effectively told the jury that the drug conspiracy laws are more important than the Bill of Rights. Finally, also in her rebuttal, the prosecutor said, "There's never going to be enough evidence for a defense attorney." Perez contends that this last comment impermissibly shifted the burden of proof onto the defense.

[41] We accord wide latitude to counsel during closing argument, and we also give some deference to the district court's determination regarding the prejudicial or inflammatory nature of those arguments. *Willis*, 6 F.3d at 263. Although it is highly improper for a prosecutor to "invoke his personal status as the government's attorney or the sanction of the government itself as a basis for convicting a criminal defendant," *United States v. Goff*, 847 F.2d 149, 163 (5th Cir.), *cert. denied*, 488 U.S. 932, 109 S.Ct. 324, 102 L.Ed.2d 341 (1988), the district court mitigated the prejudicial effect of the prosecutor's mention of her status as the government's attorney by quickly instructing the jury as follows:

> Ladies and gentlemen I will give you instructions about the government's burden and the government's role with regards to what they have to prove beyond a reasonable doubt and what one of these attorneys says, including [the prosecutor], doesn't change that in any way whatsoever.

We also discount Perez's attempt to characterize an isolated remark by the prosecutor as an effort, much less an effective one, to shift the burden of proof onto the defense. Taken in context, the prosecutor's remark that [t]here's never going to be enough evidence for a defense attorney" seems to have been meant only to point

out that all defense attorneys will argue that the evidence against their clients is insufficient, not that all defendants are guilty. Additionally, just prior to this comment, the district judge had instructed the jury twice in quick succession that the burden of proof never shifts from the government and remains on the government to prove guilt beyond a reasonable doubt.

[42-45] Garcia and Garza add complaints about a few other prosecutorial arguments during rebuttal. The prosecutor attacked several of the defense attorneys for failing to explain the few pieces of non-testimonial evidence against their clients and for adopting the strategy of attacking the character of the main government witnesses. Garcia and Garza contend that these comments were, at a minimum, indirect references to the defendants' failure to testify. Of course, both direct and indirect comments on a defendant's decision not to testify constitute violations of the Fifth Amendment's guarantee against compulsory self-incrimination. *United States v. Forrest*, 620 F.2d 446, 455 (5th Cir.1980). Certainly the prosecutor could have summarized the evidence in a way less likely to focus the jury's attention on defendants' decisions not present any evidence of their own, but merely calling attention to the fact that the governments evidence has not been rebutted or explained is not automatically a comment on a defendant's failure to testify. *United States v. Pitre*, 960 F.2d 1112, 1124 (2d Cir.1992); *United States ex rel. Adkins v. Greer*, 791 F.2d 590, 598 (7th Cir.), *cert. denied*, 479 U.S. 989, 107 S.Ct. 584, 93 L.Ed.2d 586 (1986). The district judge certainly did not interpret the prosecutor's comments as violative of guarantee against self-incrimination; on several occasions he responded to defense objections by reminding the jury simply that the burden of proof remained with the government, regardless of the prosecutor's arguments. To hold that a prosecutor's comment is a comment on the defendant's failure to testify, we must conclude that the prosecutor's manifest intention was to

comment on that failure or that the comment was such that the jury would naturally and necessarily take it to be such a comment. *United States v. Dula*, 989 F.2d 772, 776 (5th Cir.), *cert. denied*, - U.S. -, 114 S.Ct. 172, 126 L.Ed.2d 131 (1993). We think this conclusion is not warranted on this record; the judge's instructions would lead the jury away from placing such a construction on the prosecutor's remarks, and in any event the final jury instruction offset any harm by informing the jury that "no inference whatever may be drawn from the election of a defendant not to testify."

[46, 47] Garcia also argues that the prosecutor personally vouched for the credibility of Gonzalez by asserting that government informants are fired if they are found to have lied to law enforcement officers. This argument is meritless. Because no objection to this argument was made, we review only for plain error, which we find lacking. The record makes it plain that the prosecutor merely repeated the testimony of agent Alvarez and did not assert outside knowledge of this policy or of Gonzalez's honest.[1] *See United States v. Carter*, 953 F.2d 1449, 1461 (5th Cir.) (rejecting a claim based on a prosecutor's praise of DEA agents for their bravery in part because the prosecutor did not imply outside knowledge of their bravery, much less of thier truthfulness), *cert. denied*, - U.S. -, 112 S.Ct. 2980, 119 L.Ed.2d 598 (1992). Nor do we accept Garcia's contention that the prosecutor made improperly inflammatory pleas for the jury to act as the conscience of the community. To the extent that she made such a plea, the district judge responded to a defense objection by instructing the jury to consider only the guilt of the individual defendants and not any possible effects of the verdicts on the

---

[1] Garcia's attorney quotes the offending comment in his brief but conveniently omits the portion that makes it clear that the prosecutor is only restating agent Almarez's testimony. Such tactics do not enhance counsel's credibility with this court.

defendants or anyone else. This was adequate to cure any error.

[48] Garza raises one other argument regarding the prosecutor's closing argument that is specific to him. Additional background facts must be recounted in order for us to address his claim.

A search warrant was executed on Garza's residence in April 1989. Among the materials seized was a certificate of deposit (CD) dated August 23, 1988, in the amount of 90,000. This CD was admitted into evidence near the end of the trial, along with some of Garza's income tax returns stating that his adjusted gross income in both 1987 and 1988 was about $23,000. The government's purpose in introducing this evidence, plainly, was to imply Garza's involvement in the drug conspiracies by highlighting the disparity between his declared income and his actual wealth. The prosecutor explicitly drew the connection between the July 1988 drug transaction near Giddings and the purchase of the CD in August 1988 in her closing argument. In his motion for new trial, Garza claimed that the government knew before trial that the money used to purchase the CD did not come from drug transactions, and he attached a DEA report (referred to as a "DEA-6") from May 1989 stating that some $87,000 of the money Garza used to buy the CD came from two checks, one from a Mexican bank and the other from "Merill [sic] Lynch, Pierce/Fender [sic] and Smith Incorporated" in McAllen, Texas.

Garza argues that the prosecutor's argument based on the CD was improper because his defense attorney was unaware that the government knew about the source of the funds and nevertheless planned to make a jury argument inviting the inference that the CD was bought with drug proceeds. He also contends that the government withheld the DEA-6 despite his pretrial requests for exculpatory evidence. Garza relies on our opinion in *United States v. Anderson*, 574 F.2d 1347 (5th Cir.1978), in which we stated that "the

knowing use by the prosecution of false evidence or perjured testimony which is material to the issues in a criminal trial is a denial of due process. A conviction obtained by the use of such evidence cannot be permitted to stand." *Id.* at 1355 (footnotes omitted).

[49] The government responds that Garza's claim is without merit because the prosecutor made no false statements in her closing argument. As the district court observed during the hearing on Garza's motion for new trial, the DEA-6 does not show that the money Garza used to purchase the CD was legitimately acquired, much less that the government knew that the money was legitimately acquired. Indeed, the DEA-6 does not even eliminate the possibility that Garza used the money from the Giddings drug sale (or from some other drug transaction), filtered through financial institutions, to buy the CD. The inference to be drawn from the disparity between Garza's income and his wealth is thus not negated by the DEA-6. Garza has not shown that the prosecutor's comments were based on false evidence. In any event, *Anderson* requires reversal only if the prosecution's use of false evidence creates a reasonable likelihood that the jury's verdict might have been different. *Id.* at 1356. We find no such likelihood on these facts.

Taking the trial as a whole, we conclude that the prosecutor's closing argument does not cast "serious doubt," *Willis*, 6 F.3d at 263, upon the correctness of the jury verdict or the fairness of the trial.

C. MISCELLANEOUS COMPLAINTS

Rodriguez makes two other complaints about the prosecutor's conduct in the instant case that are without merit. He contends that his counsel requested the prosecution to produce the photo array from which Rodriguez was apparently identified, that the court granted his request, and that the prosecutor disobeyed the court's direction by refusing to provide the array. We have reviewed the pertinent portion of the record

and found that the court directed the prosecutor and Rodriguez's defense counsel to confer (apparentlv out of court) and report back to the court if there was still any disagreement. The district judge told the attorneys that if they did not bring the matter to his attention again "the Court will assume that that's been taken care of." Rodriguez does not call our attention to any subsequent hearing on the matter, so we cannot conclude that this incident involved any prosecutorial misconduct.

Rodriguez's other complaint is that the government used the indictment process in a matter that constituted prosecutorial misconduct. We believe that this claim is more properly analyzed under the speedy trial rubric, which Rodriguez also invokes.

VI. SPEEDY TRIAL AND APPELLATE DELAY

A. SPEEDY TRIAL ACT

Rodriguez contends that the district court erred in overruling his motion to dismiss the third superseding indictment by reason of delay. We review the facts supporting a Speedy Trial Act ruling using the clearly erroneous standard and the legal conclusions de novo. *United States v. Ortega-Mena*, 949 F.2d 156, 158 (5th Cir.1991).

Rodriguez was first named as a defendant (under the name Lencho Ramirez) in the superseding indictment filed on April 23, 1991, and he was arrested and made his initial appearance on May 1, 1991. A new superseding indictment (apparently the third superseding indictment in the case), was filed on November 26, 1991. At the arraignment on this indictment, which took place on December 3, 1991, the presiding magistrate judge noted that the only change wrought by the new indictment was to expand the alleged length of each conspiracy.

Although the government claims that Rodriguez did not move to dismiss the new

indictment, the record belies this assertion; on December 16, 1991, Rodriguez filed a motion to dismiss by reason of delay. This motion was denied after a hearing on January 3, 1992. Trial commenced, as we have noted, on January 15, 1992.

The Speedy Trial Act requires that criminal defendants be tried "within seventy days from the filing date ... of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1). The seventy-day clock will be tolled during certain delays enumerated in § 3161(h). Under § 3161(h)(1)(F), the clock is tolled during any "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." The government contends that this provision negates Rodriguez's speedy trial argument.

[50] The Supreme Court has held that § 3161(h)(1)(F) tolls the speedy trial clock during all delays between the filing of a motion and the conclusion of the hearing on that motion, regardless of whether the delay in holding that hearing is "reasonably necessary." *Henderson v. United States*, 476 U.S. 321, 330, 106 S.Ct. 1871, 1877, 90 L.Ed.2d 299 (1986). This indefinite exclusion is limited, however, by § 3161(h)(1)(J), which limits to thirty days an exclusion "reasonably attributable to any period ... during which any proceeding concerning the defendant is actually under advisement by the court." Once a hearing has been held on a motion and all necessary additional materials submitted to the court, or once a motion not requiring a hearing is filed along with necessary supporting materials, § 3161(h)(1)(J) limits the excluded period to thirty days. *See Henderson*, 476 U.S. at 329, 106 S.Ct. at 1876 (noting that district courts cannot use § 3161(h)(1)(F) to circumvent the thirty-day limit of § 3161(h)(1)(J)). The fact that pretrial motions are pending, standing alone, not necessarily toll the speedy trial clock indefinitely; the motions must require a

hearing under § 3161(h)(1)(F) if indefinite tolling is to occur. *See generally United v. Johnson*, 29 F.3d 940, 942-43 (5th Cir.1994) (providing an overview of the proper interplay between §§ 3161(h)(1)(F) and (J)).

[51, 52] It appears that we have implicitly agreed with the several circuits that have consistently interpreted § 3161(h)(7) to provide that all defendants who are joined for trial generally fall within the speedy trial computation of the latest codefendant and that the excludable delay of one codefendant may be attributed to all defendants. *United States v. Neal*, 27 F.3d 1035 (5th Cir.1994) (holding that the clock was tolled from the day the last-arraigned defendant appeared before a judicial officer because "[a]t that time, several Defendants already had filed pretrial motions, and pretrial motions of some type remained pending [for over two years]."); *see also United States v. Arbelaez*, 7 F.3d 344, 347 (3d Cir.1993); *United States v. Butz*, 982 F.2d 1378, 1381 (9th Cir.) (observing that the First, Second, Sixth, Eighth, and District of Columbia Circuits also follow this interpretation), *cert. denied*, - U.S. -, 114 S.Ct. 250, 126 L.Ed.2d 203 (1993); *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1477 (11th Cir.), cert. denied, - U.S. -, 113 S.Ct. 436, 121 L.Ed.2d 356 (1992); *United States v. Tanner*, 941 F.2d 574, 580 (7th Cir.1991), *cert. denied*, - U.S. -, 112 S.Ct. 1190, 117 L.Ed.2d 432 (1992). The filing of a superseding indictment does not affect the speedy trial clock for offenses charged in the original indictment or any offense required to be joined under double jeopardy principles. *United States v. Gonzales*, 897 F.2d 1312, 1316 (5th Cir.1990), *cert. denied*, 498 U.S. 1029, 111 S.Ct. 683, 112 L.Ed.2d 675 (1991). The clock continues to run from the original indictment or arraignment, whichever was later, and all speedy trial exclusions apply as if no superseding indictment had been returned. *Id.* This prevents the government from circumventing the speedy trial guarantee through the simple expedient of

obtaining superseding indictments with minor corrections. However, motions pending on the charges in the previous indictment continue to toll the clock after the superseding indictment is returned if some of the original charges are retained. *Id.* at 1316-17.

[53-55] The government relies principally on the *James*[2] motions filed by Rodriguez's codefendants before Rodriguez himself was indicted to toll the speedy trial clock. The record contains a pretrial ruling by the district court filed on March 4, 1991, in which the court ordered *James* motions by Garza, Pedraza, Baldemar Bermea, and Guadalupe Bermea to be carried with the case until trial. The district court ruled on the defendants' *James* motions at trial after the close of the government's evidence on January 27, 1992.[3] The Eleventh Circuit has specifically held that *James* motions will toll the speedy trial clock until trial if the hearing is deferred until trial. *United States v. Phillips,* 936 F.2d 1252, 1254 (11th Cir.1991); *United States v. Garcia,* 778 F.2d 1558, 1562 (11th Cir.), *cert. denied,* 477 U.S. 906, 106 S.Ct. 3279, 91 L.Ed.2d 568 (1986). It appears, however, that we have never specifically so held in this circuit. In *Johnson* we held that a pending *James* motion that was never argued or ruled upon, even at trial, did not toll the speedy trial clock beyond the thirty days

---

[2] *United States v. James,* 590 F.2d 575 (5th Cir.) (en banc), *cert. denied,* 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979).

[3] The Court denied the *James* motions. Avalos and Garza make bald assertions that this ruling was in error, but we need not address claims unsupported by argument. *United States v. Ballard,* 779 F.2d 287, 295 (5th Cir.), *cert. denied,* 475 U.S. 1109, 106 S.Ct. 1518, 89 L.Ed.2d 916 (1986). In any event, the government satisfied its burden under Federal Rule of Evidence 801(d)(2)(E) to show by a preponderance of the evidence that the alleged conspiracies existed, *Bourjaily v. United States,* 483 U.S. 171, 176, 107 S.Ct. 2775, 2779, 97 L.Ed.2d 144 (1987), thereby rendering the conconspirator statements complained of admissible.

permitted by § 3161(h)(1)(J). *Id.*, at 945. We recognized that the result might have been different had the trial court held a hearing on the *James* motion immediately before or during trial. *Id.*, at 944 n. 8.

We must decide the question left open in *Johnson* in the instant case because other pretrial motions and continuances did not sufficiently toll Rodriguez's speedy trial clock to bring him within the seventy-day limit. Several of Rodriguez's codefendants filed motions to suppress evidence prior to Rodriguez's initial appearance. These motions were ultimately heard on September 10, 1991, and the district court denied the last motion to suppress on September 12, 1991. Rodriguez's speedy trial clock thus could not have started to run until September 13, 1991. It did not, however, because Avalos filed a motion in limine on September 11, 1991, which tolled the clock for at least thirty days under §§ 3161(h)(1)(F) and (J). According to the government, the district judge carried this motion to trial and ruled on it on the first day of the trial. Our review of the record, however, shows that the motion was mentioned at the beginning of the trial, but we find no ruling on the motion in the portion of the record cited by the government. Giving Rodriguez the benefit of the doubt, we will presume that the motion in limine tolled the clock for only thirty days. In any event, Rogelio Bermea obtained a continuance, granted by the court under the "ends of justice" provision of the Speedy Trial Act, § 3161(h)(1)(8), on September 23, 1991, resetting the trial for October 15, 1991. Trial did not actually begin then, and the next pretrial motion cited by the government was Rodriguez's own motion to dismiss by reason of delay, filed December 16, 1991. Sixty-one days lapsed between October 15 and December 16, 1991. The motion to dismiss tolled the clock until January 3, 1992, when the motion was denied. Nine more days lapsed before the government filed a motion in limine on January 13, 1992. If we do not consider the *James* motions in our calculus, seventy non-excludable days lapsed before trial

began on January 15, 1992, and the Speedy Trial Act was violated.

We have observed that pending motions carried for heating just before or during trial will toll the speedy trial clock indefinitely. *United States v. Santoyo,* 890 F.2d 726, 728 (5th Cir.1989), *cert. denied, 495* U.S. 959, 110 S.Ct. 2567, 109 L.Ed.2d 749 (1990). In *Santoyo,* we held that a defendant's motion in limine tolled the clock for some eight months even though the district court carried the motion for hearing during trial soon after the motion was filed. *Id.* at 728. In *United States v. Welch,* 810 F.2d 485, 488 (5th Cir.1987), we held that a defendant's motion to sever tolled the clock for almost two years in the absence of any showing that the dendant had unsuccessfully attempted to receive a hearing. In *Johnson* we left open the question of whether *James* motions carried until and actually ruled upon during trial could toll the speedy trial clock throughout their pendency. *Johnson,* at 944 n. 8. Confronted with such a case, we agree with the Eleventh Circuit's decisions in *Phillips* and *Garcia.*

We conclude that the pendency of Rodriguez's codefendants' *James* motions tolled the speedy trial clock throughout Rodriguez's prosecution because they were ultimately heard and ruled upon during trial. His Speedy Trial Act claim is therefore without merit.

B. APPELLATE DELAY

Garza contends that the delay that has occurred between his conviction and the consideration of his appeal has denied him due process. He was convicted in January 1992 and sentenced in May 1992; it appears that his request for the appellate record was not met until some time after June 8, 1993, when Garza's attorney contacted the clerk of this court inquiring into the reasons for the delay. At the time Garza filed his original brief with this court, he asserts, he had already been incarcerated for some twenty-two months.

[56] In *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981), a civil rights action, we recognized that a state could violate due process if it substantially delayed the appellate process it provided for convicted criminal defendants, *See id.* (assuming without deciding that a delay of almost two years between the filing of a notice of appeal and the state's preparation of the appellate record exceeds the limits of due process). The Ninth Circuit has recognized that extreme delay in the processing of an appeal may amount to a violation of due process," in the context of federal criminal cases. *United States v. Tucker*, 8 F.3d 673, 676 (9th Cir.1993) (en banc), *cert. denied*, - *U.S.* -, 114 S.Ct. 1230, 127 L.Ed.2d 574 (1994). The factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2191-92, 33 L.Ed.2d 101 (1972), guide our inquiry. Thus, we must consider the length of the delay, the reasons for the delay, the defendant's assertion of his right to appeal, and the prejudice to the defendant occasioned by the delay. *Tucker*, 8 F.3d at 676; *Rheuark*, 628 F.2d at 303 n. 8. In the appellate context, we evaluate the fourth factor by focusing on three types of possible prejudice from appellate delay: (1) oppressive incarceration pending appeal, (2) the anxiety and concern of the convicted party awaiting the outcome of the appeal, and (3) impairment of the convicted party's grounds for appeal or the viability of his defenses in the event of retrial. *Tucker*, 8 F.3d at 676; *Rheuark*, 628 F.2d at 303 n. 8.

[57] We cannot ascertain with precision the length of the delay in the instant case. Garza filed his notice of appeal in May 1992. His record excerpts contain a letter to the clerk of our court indicating that Garza's attorney had not yet received the record in early June 1993. According to the government, however, the record was forwarded to this court on May 14, 1993. Garza filed his original brief on October 4,

1993, so in any event less than a year and a half passed between the filing of his notice of appeal and his receipt of the record. Although this delay is unfortunate, it is not so excessive as to militate strongly in Garza's favor. *See Tucker*, 8 F.3d at 674 (affirming Tucker's conviction despite a delay of over three years between Tucker's notice of appeal and the completion of the trial transcript).

Moreover, we do not believe that Garza has satisfied the prejudice prong of the test, which has been identified as the most important factor in the analysis. *Id.* at 676. The only claim of prejudice that Garza makes is that he fears the government may destroy certain exculpatory evidence that it did not provide to him before trial. This claim is not persuasive; even if it were, it is not clear that the delay complained of by Garza is at all connected with the prejudice he asserts. *See Rheuark*, 628 F.2d at 303 n. 8 (observing that the loss of defense witnesses is one type of possible prejudice from appellate delay). We reject Garza's due process claim.

VII. JUDICIAL MISCONDUCT

[58] Perez and Garza both complain of judicial misconduct giving the appearance of partiality towards the prosecution. Perez styles his complaint as a due process claim, while Garza argues that the judge's conduct deprived him of the effective assistance of counsel. In both cases, our role is to determine whether the judge's behavior was so prejudicial that it denied the defendant a fair, as opposed to a perfect, trial. *Williams*, 809 F.2d at 1086 (citing *United States v. Pisani*, 773 F.2d 397, 402 (2d Cir.1985)). To rise to the level of constitutional error, the district judge's actions, viewed as a whole, must amount to an intervention that could have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor. *United States v. Samak*, 7 F.3d 1196, 1197-98 (5th

Cir.1993); *United States v. Davis,* 752 F.2d 963, 974 (5th Cir.1985); *United States v. Gomez-Rojas,* 507 F.2d 1213. 1223-24 (5th Cir.), *cert. denied,* 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975). The judge's intervention in the proceedings must be quantitatively qualitatively substantial to meet this test. *Davis,* 752 F.2d at 974.

In his brief, Perez recounts numerous episodes from the trial that he contends illustrate the plain appearance of judicial bias on the part of the district judge. First, the judge interrupted Perez's attorney several times during his opening statement. Next, Perez claims that the judge showed a pattern of bias in favor of the prosecution by sustaining objections before the prosecution even made them. On several occasions, according to Perez, the judge even rehabilitated government witnesses Gonzalez, Gomez, and Solis during the defendants' cross-examination of those witnesses. The judge frequently explained his decision to intervene in the questioning in terms of his concern for efficiency and clarity, and the government stresses the district judge's authority to control the tone and tempo of a trial and to elicit additional information from witnesses if he believes it would benefit the jury. *United States v. Rodriguez,* 835 F.2d 1090, 1094 (5th Cir.1988).

[59-61] We begin by dismissing Perez's complaint based on the district judge's occasionally peremptory style of sustaining prosecution objections. Contrary to Perez's suggestion, the trial judge was not in the habit of sustaining prosecution objections without any prompting from the prosecutor herself. Although the judge did sustain several prosecution objections without waiting to hear their legal bases, he generally acted only after the prosecutor had interrupted defense questioning by standing and addressing the court. Additionally, although the frequency of a court's interruptions of defense counsel is significant, the nature of those interruptions is more pertinent to our

inquiry. *Williams*, 809 F.2d at 1087. Given the numerous defendants in this case, the district judge's intervention was helpful in keeping the proceedings moving forward and preventing repetition. Moreover, his manner toward the defendants in sustaining these objections was not such as would suggest any departure from neutrality. Nor do we fault the judge's interruption of the opening statement by Perez's counsel, as it appears that the judge intervened simply to prevent counsel from straying into the mode of closing argument.

[62] We next consider the judge's occasional colloquies with government witnesses during cross-examination. When one defense attorney asked Gonzalez if he was the primary source of information for the government agents, Gonzalez answered yes and the prosecution objected. The following exchange occurred:

> THE COURT: Objection sustained. How do you know that? Have they told you everybody that they talk to?
>
> GONZALEZ: No, sir, I'm sorry.
>
> THE COURT: Well, then, how-what do you base that answer on?
>
> GONZALEZ: Well, he asked-
>
> THE COURT: Why don't you listen to the questions here?
>
> GONZALEZ: Yes, sir.
>
> THE COURT: He asked you if you were the primary source of the agents. And your answer is what? Are you? And if you are, and you say yes, how do you know that?
>
> GONZALEZ: I don't know that.
>
> THE COURT: Well, then, why did you say yes?

GONZALEZ: I didn't stop to think.

THE COURT: Well, you need to.

GONZALEZ: Yes, sir. Thank you.

Although Perez styles this exchange as rehabilitation of the witness by the court, we find it difficult to perceive how the defense was harmed by the court's tongue-lashing of one of the prosecution's key witnesses. The exchange, which concerned a truly collateral question and answer, seems unlikely to impress a jury with the judge's partiality to the prosecution's cause.

[63] Perhaps more problematic was the following exchange between the court and government witness Gomez. During cross-examination, Gomez appears to have testified (although his testimony is somewhat confusing) that his wife and children had occasionally accompanied a drug-runner named Javier Garcia during previous operations. When asked by defense counsel why he sent his wife and children with Garcia, Gomez answered, "That was stupid on my side." Counsel asked if Gomez did it as a favor, but the judge interrupted and the following conversation took place:

> THE COURT: Well, it's stupid, but the reason that you do something like that is because you want people to think that this is an innocent situation, isn't that right?
>
> GOMEZ: That's correct.
>
> THE COURT: Children are used in that situation. It pretends like it's a family outing. Isn't that sometimes the practice that's carried out!
>
> GOMEZ: That's correct, Your Honor.

> THE COURT: And that women are less likely to be suspected if they have children with them?
>
> GOMEZ: That's correct, Your Honor.
>
> THE COURT: And that's the reason that you allowed this to happen, and it was planned that way?
>
> GOMEZ: That's correct. I regret it, though.

In Perez's view, this colloquy was highly prejudicial because it made the behavior testified to by the witness appear to be normal; apparently Perez would have preferred to leave Gomez's testimony about the involvement of his wife and children unexplained and thus, presumably, less believable. We do not believe, however, that any substantial prejudicial effect accrued from the judge's intervention. It bears repeating that the district judge "may question witnesses and elicit facts not yet adduced *or clarify those previously presented.*" *Williams*, 809 F.2d at 1087 (citation omitted) (emphasis added).

[64] Government witness Solis was cross-examined extensively about his 1989 guilty plea in federal district court for his role in transporting marijuana during the second conspiracy. Solis testified that when he pleaded guilty he did not tell the court about the involvement of his coconspirators, and Perez's defense counsel got Solis to admit that he had probably lied under oath in so doing. Later, Rogelio Bermea's attorney returned to this subject and tried to get Solis to admit that he had been under oath each time he met with the judge before whom he had pleaded guilty. At this point the district judge intervened and asked Solis if he had been placed under oath only at the time of his plea and not at sentencing, to which Solis agreed. The judge went so far as to "take judicial notice of the fact that when we sentence individuals we don't place them under

oath." Again, this appears to have been a rather collateral matter, and the judge's intervention seems designed to clarify the witness's somewhat confused testimony about events three years earlier rather than to bolster the prosecution's case or to convey to the jurv a desire to thwart the defense's efforts. During cross-examination by still a third defense attorney, the judge again interrupted to explain the normal procedures followed at sentencing when Solis had difficulty rememberng. We do not consider the judge to have overstepped his role in ensuring the clarity of the evidence for the jury's scrutiny. Even though the judge arguably cut off a possible avenue of impeachment, the value of impeaching Solis on the intricacies of the procedures attendant to a guilty plea could not have been great. The manner in which the judge undertook the explanation was not overtly hostile to the defense or favorable to the prosecution.

[65] Finally, Perez complains that the district judge actively rehabilitated Solis after Garza's defense attorney got Solis to contradict his previous testimony regarding letters Solis had sent to the Bermeas from jail asking for money. After Solis admitted that he had lied on the previous day during his testimony, the judge stepped in and asked Solis why he had lied; Solis then retreated and said he had simply gotten confused. We do not consider this incident sufficiently egregious to warrant reversal. As the judge noted, Solis's testimony the previous day had been elicited by the judge himself, and that testimony was more equivocal than Garza's attorney represented in his cross-examination; the judge was therefore within his prerogative to clarify the proceedings for the benefit of the jury. In any event, the jury witnessed Solis's self-contradiction to the extent it actually occurred and could use that fact in assessing his credibility if it chose to do so.

Additionally, we note that the district judge took care to give an accurate jury instruction regarding his role in the proceedings. He observed that he had occasionally made

comments to the lawyers and asked questions of the witnesses, and he instructed the jury not to assume from any of his actions that he had any opinion about the facts of the case. The judge went on to state, "Except for my instructions to you on the law, you should disregard anything I may have said or done during the course of the trial, in arriving at your findings as to the facts." We have held that a curative instruction such as this one can operate against a finding of constitutional error. *Samak*, 7 F.3d at 1198 (citing *Davis*, 752 F.2d at 975).

Having reviewed all the incidents complained of by Perez in the context of the entire trial and jury instructions, we conclude that the district judge's actions in handling the trial did not stray so far from neutrality as to cast any doubt on the ability of the jury to consider Perez's case without a predisposition towards a finding of guilt. The intervention that did occur was not such as would have caused jury confusion regarding the roles of judge and prosecutor.

[66, 67] Garza contends that the judge prevented his defense counsel from effectively cross-examining and impeaching the government's witnesses on several occasions. Having reviewed the pertinent portions of the record, we are in general agreement with the government that the district judge for the most part intervened only when necessary to prevent repetition and that Garza's attempts to impeach the government witnesses were not unduly hampered. Garza complains that he was not allowed to publish to the jury a signature he procured from Solis during trial for purposes of comparison, but the judge simply held that defense exhibit along with all other exhibits for the jury's inspection when they began deliberating. Finally, Garza complains of Solis's testimony that Solis's brother had told him that Garza wanted to pay Solis not to testify, but as the district judge pointed out at the time it was Garza's own attorney that inadvertently coaxed Solis to testify in this manner. The incident did not involve judicial

misconduct. Garza's judicial misconduct complaints are without merit.

VIII. SEVERANCE

[68,69] Rodriguez and Rogelio Bermea contend that they were improperly joined in the same indictment as their codefendants and that the district court erred in denying their motions for severance. They have waived any argument, however, that their joinder was improper under Federal Rule of Criminal Procedure 8(b). We have noted that a claim of misjoinder under Rule 8 is conceptually distinct from a claim that the district court should have granted a severance under Rule 14, *Manzella,* 782 F.2d at 540. Neither appellant has provided a citation to the portion of the record (assuming that one exists) in which the misjoiner argument was presented to the trial court. Typically, we will not consider matters not presented to the trial court. *Quenzer v. United States, (In re Quenzer),* 19 F.3d 163, 165 (5th Cir.1993). In any event Rodriguez and Rogelio Bermea do not argue that they were misjoined in the argument sections of their briefs, but instead confine their arguments to the district court's denial of their motions for severance. We will confine ourselves to the severance argument actually presented in their briefs. *United States v. Ballard,* 779 F.2d 287, 295 (5th Cir.), *cert. denied,* 475 U.S. 1109, 106 S.Ct. 1518, 89 L.Ed.2d 916 (1986). Garza makes an argument that he was entitled to a severance; his complaint, however, focuses on the joint trial of the two conspiracy charges against him rather than on the joint trial of all the defendants in this case.

[70-72] We review the denial of a motion for severance for abuse of discretion. *United States v. Castro,* 15 F.3d 417, 422 (5th Cir.1994), *petition for cert. filed* (U.S. May 27, 1994) (No. 93-9334); *United States v. Arzola-Amaya,* 867 F.2d 1504, 1516 (5th *Cir.), cert. denied,* 493 U.S. 933, 110 S.Ct. 322, 107 L.Ed.2d 312 (1989). If defendants have been properly joined, the

district court should grant a severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable determination of guilt or innocence. *Zafiro v. United States*, - *U.S.* -, -, 113 S.Ct. 933, 938, 122 L.Ed.2d 317 (1993), *Castro*, 15 F.3d at 422. Any prejudice created by a joint trial can generally be cured through careful jury instructions. *Castro*, 15 F.3d at 422.

A. RODRIGUEZ AND ROGELIO BERMEA

[73,74] Rogelio Bermea does not persuade us that any of his specific trial rights were compromised by the joint trial or that the jury was prevented from making a reliable determination of his guilt or innocence. He cites only two incidents of the joint trial as probative of prejudice to his defense. First, he complains that Garza's defense prejudiced his trial rights by spending a large part of his cross-examination "on restating testimony against Rogelio Bermea." Even if this were true, we would be hard-pressed to find any great prejudice against Rogelio Bermea from this fact alone; in any event, our review of the record belies this assertion. Second, Rogelio Bermea argues that he was greatly prejudiced by being tried jointly with three family members (including Eleazar Bermea, who pleaded guilty during the trial). As we have already seen, however, the jury was able to draw distinctions among the Bermea defendants, acquitting Baldemar Bermea of two of the three counts against him. The district judge, we also note, was careful to require the prosecution to specify which Bermea was being discussed by government witnesses during their examinations. The jury instructions also reduced any prejudice to Rogelio Bermea from the joint trial.[4]

---

[4] Rogelio Bermea also raises a claim of ineffective assistance of counsel. We conclude that this case is appropriate for application of the general rule in our circuit that such claims cannot be resolved on direct appeal unless first raised in the district court. *United States v. McCaskey*, 9 F.3d 368, 380 (5th

[75] Rodriguez complains that he was prejudiced by the joint trial because of the tactics adopted by counsel for his codefendants. He claims an exchange between Gonzalez and Rogelio Bermea's defense counsel, in which Bermea's counsel expressed disgust with Gonzalez's profession and asked Gonzalez if he was a "sneaky, sleazy liar", left the jury with the impression that the defense table was in complete disarray. He also complains about an objection made by Garza's defense attorney during his own counsel's closing argument. These incidents, however, were minor when viewed in the context of the whole record and did not put Rodriguez's trial rights at serious risk. The objection to Rodriguez's counsel's closing argument, in particular, was harmless because his counsel was merely prevented from showing the jury a copy of a report from a law enforcement agency, and not from arguing the contents of that report.

Rodriguez also focuses on language in *Zafiro* in which the Court recognized that "[w]hen many defendants are tried together in a complex case and they have markedly different degrees of culpability, th[e] risk of prejudice is heightened." *Zafiro*, - U.S. at -, 113 S.Ct. at 938. We reject this argument as well. This case, although involving numerous defendants, did not involve particularly complex facts. Nor does Rodriguez's alleged lesser involvement in the drug trafficking mandate severance. Both Gomez and Gonzalez testified that Rodriguez substantially participated in the July 1988 shipment of marijuana for Garcia, and the evidence against Rodriguez was not significantly less than the evidence against some of the other defendants involved in that transaction. In any event, "a quantitative disparity in the evidence

---

Cir.1993), *cert. denied*, - U.S. -, 114 S.Ct. 1565, 128 L.Ed.2d 211 (1994). The record is not sufficiently developed with respect to the merits of the claim to justify an exception. Bermea remains free to pursue his claim in accordance with 28 U.S.C. § 2255.

'is clearly insufficient in itself to justify a severance.'" *United States v. Pofahl*, 990 F.2d 1456, 1483 (5th Cir.) (citation omitted), *cert. denied*, - U.S. -, 114 S.Ct. 266, 126 L.Ed.2d 218, *and cert. denied*, - U.S. -, 114 S.Ct. 560, 126 L.Ed.2d 460 (1993). Nor do we find any "spillover effect" severe enough to warrant reversal. Rodriguez complains of certain extrinsic offense evidence admitted at trial regarding an earlier cocaine-trafficking conspiracy involving Garcia, Guadalupe and Baldemar Bermea, Avalos, and others. Rodriguez was not mentioned in connection with this scheme, however, and we presume that the jury followed its instructions to consider the case against each defendant "separately and individually." *See id.* at 1483 & n. 36.

We conclude that any prejudice suffered by Rogelio Bermea and Rodriguez as a result of the joint trial was not substantial enough to warrant a finding of abuse of discretion. Moreover, any prejudice was sufficiently cured by the district court's instructions to the jury.

B. HONORIO GARZA

[76, 77] Garza complains that the district court abused its discretion by refusing to sever the two conspiracy counts against him. We may reverse only on a showing of clear prejudice from the court's decision. *United States v. Fortenberry*, 914 F.2d 671, 675 (5th *Cir.), reh'g denied with opinion*, 919 F.2d 923 (5th Cir.1990), *cert. denied*, 499 U.S. 930, 111 S.Ct. 1333, 113 L.Ed.2d 265 (1991). "Clear prejudice may result when the jury is unable to separate the evidence and apply it to the proper offenses, or where the jury might use the evidence of one of the crimes to infer criminal disposition to commit the other crimes charged." *Id.* Garza contends that the similarities between the two conspiracies created a high probability of jury confusion, as well as a strong possibility that the jury would use the stronger evidence connecting Garza with the first conspiracy to convict him of the second as well.

We reject Garza's contention. Although the conspiracies were quite similar in many respects, they were distinct in time and involved different participants. As our statement of the facts, *supra* Part I.A, illustrates, the evidence at trial was fairly easy to separate as relevant to either one conspiracy or the other. Jury confusion was not unusually likely. The district judge carefully instructed the jury that "[e]ach offense and the evidence pertaining to it should be considered separately and individually." The mixed verdicts returned with respect to Perez and Baldemar Bermea demonstrate that the jury was not confused. Considering all the circumstances, we conclude that Garza has not shown that he suffered any more prejudice than inevitably inheres whenever "'multiple charges are jointly tried.'" United *States v. Rocha*, 916 F.2d 219, 229 (5th Cir.1990) (citation omitted), *cert. denied*, 500 U.S. 934, 111 S.Ct. 2057, 114 L.Ed.2d 462 (1991).

IX. MOTION FOR NEW TRIAL

[78] Garza complains of the district court's decision denying his motion for a new trial. He relies almost entirely on claims that we have already discussed. For instance, he again complains that the govern~ment failed to provide him with a copy of the DEA-6 report that described the source of the funds he used to buy the $90,000 CD. As the government points out, this information was available to Garza both before and during trial, so even if Garza's attorney did not receive the DEA-6 report (which the prosecutor contested) Garza's ability to impeach agent Alvarez or rebut the prosecutor's closing argument was not impeded. To the extent Garza is raising a *Brady* claim it is without merit. *See Dula*, 989 F.2d at 775 n. 9 (noting that *Brady* does not oblige the government to provide defendants with evidence that is equally available to the defense and the prosecution).

[79] Garza does raise one new argument claiming that the government failed to establish

the chain of custody with respect to certain telephone records introduced into evidence. Garza's defense counsel questioned the records custodian called by the government to introduce the records and elicited from her the admission that she did not know whether the records had been maintained in their original form or altered in any way. The custodian did, however, verify that the records were business records within the definition of Federal Rule of Evidence 803(6) and that they were accurate when made. Evaluating the admissibility of evidence, of course, is a matter within the sound discretion of the trial court. *United States v. Sparks,* 2 F.3d 574, 582 (5th Cir.1993), *cert. denied,* - U.S. -, 114 S.Ct. 720, 126 L.Ed.2d 684, *and cert. denied.* - U.S. -, 114 S.Ct. 899, 127 L.Ed.2d 91, *and cert denied,* - U.S. -, 114 S.Ct. 1548, 128 L.Ed.2d 198 (1994). Because any break in the chain of custody goes to the weight of the evidence rather than its admissibility, *id.* we conclude that Garza has not shown an abuse of discretion in the evidential ruling or error in the denial of his motion for new trial.

X. SENTENCING

Several appellants challenge the sentences imposed by the district court. Because they were sentenced on May 12, 1992, the district court applied the version of the federal sentencing guidelines effective from November 1, 1991, through October 31, 1992. *See United States v. Mills, 9* F.3d 1132, 1136 n. 5 (5th Cir.1993) (noting that a sentencing court must apply the version of the guidelines effective at the time of sentencing unless application of that version would violat the Ex Post Facto Clause of the Constitution).

A. DRUG QUANTITIES

[80-82] Avalos, Pedraza, Guadalupe Bermea, and Baldemar Bermea contend that the district court erred in calculating the drug quantities attributable to them under the sentencing guidelines. The amount of drugs for which an

individual shall be held accountable represents a factual finding that must be upheld unless clearly erroneous. *United States v. Maseratti*, F.3d 330, 340 (5th Cir.1993), *cert. denied*, - U.S. -, 114 S.Ct. 1096, 127 L.Ed.2d 409, and *cert. denied*, - U.S. -, 114 S.Ct. 1552, 128 L.Ed.2d 201 (1994). A finding of fact is clearly erroneous when, although there is enough evidence to support it, the reviewing court is left with a firm and definite conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct, 525, 542, 92 L.Ed. 746 (1948). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985). Drug conspirators are accountable not only for the quantities of drugs they actually possessed but also for the foreseeable acts of their coconspirators committed in furtherance of the conspiracy. United States Sentencing Commission, *Guidelines Manual*, § 1B1.3(a)(1) (Nov. 1991).[5]

1. Avalos and Pedraza

The sum and substance of the argument made by these two appellants (who share the same counsel on appeal) is as follows: "The Court erred in not granting defendant's objections to the Presentence Investigation Report and finding that the amount was 3,800 Pounds of marihuana instead of 1,800 pounds as shown by the testimony." The presentence investigation reports (PSRs) prepared for Avalos and Pedraza contained the following paragraph:

> According to the [confidential informant], he learned by conversing

[5] All citations to the sentencing guidelines are to the version effective November 1, 1991, unless otherwise indicated.

> with Pepe Villarreal and others, that Manuel Garcia had previously transported two or three other marihuana loads for Honorio Garza. These loads, which were transported within the timespan of the conspiracy cited in Count 1, involved approximately 1,000 pounds of marihuana per load. The defendants who participated in the delivery of the 1,800-pound marihuana load also took part in the transportation of the aforementioned loads. Later, another (confidential informant] corroborated the information concerning the previous loads.

Thus, the PSR recommended a base offense level for both Avalos and Pedraza of thirty-two, based on a drug quantity of 3800 pounds (roughly 1720 kilograms) of marihuana. The district court adopted the drug quantities recommended in the PSRs, but it granted both Avalos and Pedraza a two-level reduction for minor participation in the conspiracy against the recommendations of the PSRs.

[83] The trial testimony was clearly sufficient to support a finding that 1800 pounds of marijuana should be attributed to Avalos and Pedraza based on the July 1988 shipment of marihuana to Shorty Pedraza's residence in Giddings. The question is whether the district court clearly erred in "tacking on" an additional 2000 pounds of marijuana based on alleged prior shipments. We recall that a PSR generally bears sufficient indicia of reliability to be considered by the trial court as evidence in making the factual determinations required by the sentencing guidelines. *United States v. Gracia,* 983 F.2d 625, 629 (5th Cir.1993); *United States v. Robins,* 978 F.2d 881, 889 (5th Cir.1992).

[84,85] As we noted in the recitation of facts, Part I.A.1 *supra,* Gomez testified that Garcia used Gomez's ranch as a loading site ten or twelve times between January and August 1988.

Gomez clearly testified that Avalos was present on several of those occasions and that Avalos was Garcia's "next in command." Given the fact that the secret compartment used to hold the marijuana was capable of holding at least 1800 pounds of the drug, we conclude that the district court did not clearly err in assigning Avalos 3800 pounds of marijuana for sentencing purposes. The evidence connecting Pedraza with the earlier shipments is more tenuous but still sufficient. Gonzalez testified that he met Pedraza at Garcia's ranch in "early '88"; he further testified that Pedraza told him on one occasion that he was the owner of the truck used to transport the marijuana and that Garcia was paying him in installments for the truck. Avalos and Garcia also told Gonzalez that the truck was registered in Pedraza's name, and Pedraza told Gonzalez that Garcia paid him $25 per pound of marijuana to arrange for storage at Shorty Pedraza's residence. Gomez testified that the truck was actually registered under Pedraza's wife's name and that he saw Pedraza at Shorty Pedraza's residence "a couple of times." Taken as a whole, the evidence prevents us from concluding that the district court committed clear error as to the drug quantities ascribed to Avalos and Pedraza.

2. Guadalupe and Baldemar Bermea

[86] The PSRs prepared for Guadalupe and Baldemar Bermea recommended a finding that 5496 pounds (roughly 2490 kilograms) of marijuana were attributable to each for sentencing purposes. Such a finding results in a base offense level of thirty-two. The district court accepted this quantity calculation but gave both Guadalupe and Baldemar Bermea a two-level reduction for minor participation. The Bermeas contend that the evidence supporting this quantity calculation was insufficiently reliable to be relied upon by the district court at sentencing. They also contend that the court erred by attributing to each of them the entire amount of drugs involved in the second conspiracy rather than the amount of drugs

each agreed to conspire to possess with intent to distribute.

At sentencing, the district court "may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a). Reasonable reliability is all that is required by § 6A1.3(a). *United States v. Rogers*, 1 F.3d 341, 344 (5th Cir.1993). Guadalupe and Baldemar Bermea do not why the information relied upon by the district court and the probation officer who prepared the PSRs was unreliable. Law enforcement agents confirmed some 2400 pounds of the 5496-pound total because they seized 2400 pounds of marijuana from trucks driven by Gonzalez and Solis. The remaining 3000 pounds was based on an interview conducted with Solis after his arrest, in which he told a DEA agent that he had made three successful shipments of over 1000 pounds each before he was arrested during the fourth shipment. This was not far afield from Solis's testimony at trial, which indicated that one load was actually about 950 pounds, another was about 1300 pounds, and the third was at least 1000 pounds based on the amount Solis was paid by Rogelio Bermea. This information satisfies the low threshold of reliability established by § 6A1.3(a). Indeed, that section permits consideration of out-of-court declarations by an *unidentified* informant if there is good cause for the nondisclosure of the informant's identity and there is sufficient corroboration of the information by other means. U.S.S.G. § 6A1.3 comment. The Bermeas' complaint is without merit.

[87, 88] The Bermeas' other argument is based on amendments to § 1B1.3 and its commentary that took effect on November 1, 1992, after their sentencing. Although the revised guidelines are not applicable to defendants sentenced prior to that date, we have nevertheless referred to them for guidance in cases such as the one at bar because they were intended only to clarify what

the guidelines already provided. *Maseratti*, 1 F.3d. at 340. The Bermeas particularly rely on illustration (c)(7) to the new δ 1B1.3:

> Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.

U.S.S.G. δ 1B1.3 comment (illus. (c)(7)) (Nov. 1992).

The government responds that the Bermeas' argument is without merit because both Baldemar and Guadalupe Bermea were direct participants in the entire marihuana trafficking conspiracy. Both were implicated in the shipment driven by Gonzalez, and both were substantially implicated by Solis as active participants in the conspiracy throughout Solis's tenure as a driver for the Bermeas. Guadalupe and Baldemar Bermea do not provide us with sufficient basis in the record to reverse the district court's findings that both men were accountable for all the drugs possessed during the course of the conspiracy. *See* U.S.S.G. § 1B1.3 comment. n. 2 (Nov. 1992) ("With respect to offenses involving contraband (including controlled substances), the defendant is accountable for ... all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.").

B. ACCEPTANCE OF RESPONSIBILITY

[89] Guadalupe Bermea contends that the district court erred in denying him a two-level

reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a). The defendant bears the burden of demonstrating to the sentencing court that he is entitled to a donvnward adjustment for acceptance of responsibility, and we review the sentencing court's acceptance of responsibility determination with even more deference than under the pure clearly erroneous standard. *United States v. Watson*, 988 F.2d 544, 551 (5th Cir.1993), *cert. denied*, - U.S. -, 114 S.Ct. 698, 126 L.Ed.2d 665 (1994); *see* U.S.S.G. § 3E1.1 comment. n. 5 ("The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.").

[90] Bermea does not contend that he "clearly demonstrate[d] a recognition and affirmative acceptance of personal responsibility for his criminal conduct." § 3E1.1(a); he contends only that the denial of the reduction violated his constitutional privilege against self-incrimination. The same argument was made in *United States v. Singer*, 970 F.2d 1414, 1420 (5th Cir.1992) ("Singer contends that the Sentencing Guidelines' acceptance of responsibility provision impermissibly requires individuals to admit guilt in order to receive a sentence reduction."). We rejected that claim. *Id.; see also United States v. Mourning*, 914 F.2d 699, 707 (5th Cir.1990) ("The government is permitted to reward contrition. This is not the same as compelling self-incrimination."). Bermea's argument is without merit.

C. EX POST FACTO CLAUSE

[91] Baldemar Bermea contends that his sentence was imposed in violation of the Constitution because the conspiracy for which he was convicted began prior to the November 18, 1988 amendment to 21 U.S.C. § 846. He argues that the amendment increased the maximum punishment for the offense of conspiracy to possess marijuana with intent to distribute and that this increased punishment cannot

constitutionally apply to him under the Ex Post Facto Clause. U.S. CONST. art. 1, § 9.

Bermea's contention is without merit. We have recognized that an increase in sentence based on an amendment effective after an offense is committed would be a clear violation of the Ex Post Facto Clause. *United States v. Thomas*, 12 F.3d 1350, 1370 (5th Cir.), *cert. denied*, - U.S. -, 114 S.Ct. 1861, 128 L.Ed.2d 483, *and cert. denied*, - U.S. -, 114 S.Ct. 2119, 128 L.Ed.2d 676 (1994). Conspiracy, however, is a continuing offense. If there is evidence that the conspiracy continued after the effective date of the amendments, the Ex Post Facto Clause is not violated by sentencing under the amendments. *Id.* at 1370-71. The evidence that the second conspiracy continued after November 18, 1988, is substantial. If it was foreseeable to Bermea that the second conspiracy would continue past the effective dates of the ammendments, he can avoid being sentenced under thos ammendments only if he withdrew from the conspiracy by taking affirmative acts that are inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach other conspirators. *Id.* at 1371; *United States v. Devine*, 934 F.2d 1325, 1332 (5th Cir.), *cert. denied*, - U.S. -, 112 S.Ct. 349, 116 L.Ed.2d 288 (1991), *and cert. denied*, - U.S. -, 112 S.Ct. 911, 116 L.Ed.2d 811, *and cert. denied*, - U.S. -, 112 S.Ct. 954, 117 L.Ed.2d 121, *and cert. denied*, - U.S. -, 112 S.Ct. 1164, 117 L.Ed.2d 411, *and cert. denied*, - U.S. -, 112 S.Ct. 1197, 117 L.Ed. 437 (1992). Bermea cannot prevail on his Ex Post Facto Clause argument merely by asserting that his participation in the second conspiracy was not shown to have continued after November 18, 1988. *United States v. Puma*, 937 F.2d 151, 158 (5th Cir.1991), *cert. denied*, - U.S. -, 112 S.Ct. 1165, 117 L.Ed.2d 412 (1992).

We have treated a district court's decision to sentence a conspirator under amendments that became effective during the conspiracy as a factual finding subject to review only for clear

error. *Thomas*, 12 F.3d at 1371. Bermea has not shown such error to exist. His argument is meritless.

XI. CONCLUSION

For the foregoing reasons, we AFFIRM the judgments below.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7349

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BALDEMAR BERMEA, ROGELIO BERMEA, LORENZO RODRIGUEZ, MANUEL GARCIA, HONORIO GARZA, MATILDE PEREZ, GUADALUPE BERMEA, ENRIQUE AVALOS, and TEODORO PEDRAZA,

Defendants-Appellants

Appeals from the United States District Court for the Southern District of Texas

---

ON PETITIONS FOR REHEARING

(October 7, 1994)

Before GOLDBERG, KING, and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing, as to Rogelio Bermea, Lorenzo Rodriguez, and Honorio Garza, filed in the above case are denied.

ENTERED FOR THE COURT:

/s/ Carolyn King
UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7349

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

BALDEMAR BERMEA, ROGELIO BERMEA, LORENZO RODRIGUEZ, MANUEL GARCIA, HONORIO GARZA, MATILDE PEREZ, GUADALUPE BERMEA, ENRIQUE AVALOS, and TEODORO PEDRAZA,

Defendants-Appellants.

Appeals from the United States District Court
for the
Southern District of Texas

ON PETITION(S) FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 08/25/94, 5 Cir., 1994, ___ F.3d ____)

(October 7, 1994)

Before GOLDBERG, KING, and WIENER, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing, as to Lorenzo Rodriguez and Rogelio Bermea, are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, as to Honorio Garza, (FRAP and Local Rule 35) the

Suggestion for Rehearing En Banc, as to Honorio Garza, is also DENIED.

( ) The Petition(s) for Rehearing, as to Lorenzo Rodriquez and Rogelio Bermea, are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc, as to Honorio Garza, is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc, as to Honorio Garza, is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn King
UNITED STATES CIRCUIT JUDGE

REHG-4
Rev. 7/1/94

APPENDIX D

United States District Court

SOUTHERN District of TEXAS
MCALLEN DIVISION

UNITED STATES OF AMERICA
V.
HONORIO GARZA
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed (On or After November 1, 1987)

Case Number: M-90-133-S3-06

Heriberto Medrano
Defendant's Attorney

THE DEFENDANT:
☐ pleaded guilty to count(s)_____
☐ was found guilty on count(s) 1 and 2 on January 29, 1992 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846, 841(a)(1) & 841(b)(1)(B)	Conspiracy to possess, with intent to distribute, more than 100 kilograms of marihuana.	07/30/88	1
21 USC 846, 841(a)(1) & 841(b)(1)(B)	Conspiracy to possess, with intent to distribute, more than 100 kilograms of marihuana.	05/08/89	2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____
and is discharged as to such count(s).

☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

☐ It is ordered that the defendant shall pay a special assessment $ 100 for count(s) 1 and 2, which shall be due ☐ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney, for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 467-72-0961
Defendant's Date of Birth: 02/02/46
Defendant's Mailing Address:
P.O. Box 215
La Grulla, Texas 78548

Defendant's Residence Address:

_____

_____

May 12, 1992
Date of Imposition of Sentence

/S/ Ricardo H. Hinojosa
Signature of Judicial Officer

Hon Ricardo H. Hinojosa
U.S. District Judge
Name & Title of Judicial Officer

5/19/92
Date

Defendant: HONORIO GARZA Judgment-Page 2 of 4
Case Number: M-90-133-S3-06

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of one hundred fifty-one (151) months as to each of Counts 1 and 2 said imprisonment terms to run concurrently with each other.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for this district,

☐ at _____ a.m./p.m. on _____.

☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

☐ before 2 *p.m.* on _____.

☐ as notified by the United States marshal.

☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: HONORIO GARZA Judgment-Page 3 of 4
Case Number: M-90-133-S3-06

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of four (4) years as to each of Counts 1 and 2, said supervised Release Terms to run concurrently with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours, of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☐ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation office;
2) the defendant shall report to the probation office, as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month:
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any charge in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity. and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: HONORIO GARZA Judgment-Page 3 of 4
Case Number: M-90-133-S3-06

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): Paragraph #38

Guideline Range Determined by the Court:

Total Offense Level: 34

Criminal History Category: I

Imprisonment Range: 151 to 188 months

Supervised Release Range: 4 to 5 years

Fine Range: $ 17,500 to $ 2,000,000

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $_____

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reasons

APPENDIX E

or this is why I didn't do such and such.

MR. MEDRANO: That is really the required standard, and I respect that. Your Honor, while the jury is out, --

THE COURT: Yeah, I was going to get -- you wanted -- you told Ms. Martinez something about the newspaper, the reason we didn't do it before they came in is because we had already -- it was time for them to come in.

MR. MEDRANO: I understand that, Your Honor. Judge, for the record, an article appeared in today, Thursday, January -- January the 23rd, 1992, the McAllen Monitor.

MS. BOOTH: Is that the McAllen or Starr County Monitor?

THE COURT: There is no Starr County Monitor. It might be --

MS. BOOTH: Well, Your Honor, if you -- Look what it says on the front of the paper.

MR. MEDRANO: Look what it says on top of the page --

THE COURT: It's probably the Starr County page of the Monitor.

MS. BOOTH: It looks -- the Starr County Monitor.

THE COURT: Right, the Starr County Monitor, but it's the Starr County page of the Monitor.

MS. BOOTH: Okay. And we didn't make the Starr County Monitor page?

THE COURT: Okay. What -- what about the article?

MR. MEDRANO: And I'll go ahead and --

THE COURT: Mr. Medrano, the jury has been told not to read anything, not to listen to anything.

MR. MEDRANO: Well, Judge, I understand that's what you told the jury way back when, but I want to know.

THE COURT: I've told them every single time: don't forget to follow my instructions.

MR. MEDRANO: Your Honor, if I may --

THE COURT: I'm not now going to say: well, did you read the Monitor yesterday, and did you read the article?

MR. MEDRANO: No, but I want the Court (indiscernible) do is to inquire of these individuals if they have recently or today any articles in any newspapers about this case.

THE COURT: You know, Mr. Medrano, you all act like we're out in the boondocks. Any case that any jury is involved in that has some high publicity figures normally gets reported in the newspaper. And judges don't normally start asking all the time: did you read the paper yesterday? That just calls attention to things. I will tell them again when we take a break for noon: you're not to read any papers. If anybody has been listened to or watched or talked to anybody about this case, let me know right now. I will be glad to do that. But, frankly, you're inviting them to go out and buy the newspaper to read about it.

MR. MEDRANO: Well, the reason why I brought the Court's attention to it is because --

THE COURT: There was nothing -- I read yesterday's article. There was nothing in yesterday's article that didn't happen in the Courtroom that they haven't already seen.

MR. MEDRANO: The headline reads -- and I'll submit this copy for the record: The witness says he was offered a bribe not to testify. And this Court knows and the record is clear that this gentleman has no personal knowledge of any bribe being made to anybody. And so, that's not what the headline says. The headline gives people the impression, as soon as you start reading the paragraphs therein, that my client, Honorio Garza, was trying to go ahead and bribe this man --

THE COURT: Does the story say that, or the headline?

MR. MEDRANO: If you read the story, that's the impression that it gives, which is totally con -- has been contradicted by the testimony of this man.

THE COURT: No.

MR. MEDRANO: Well --

THE COURT: You stopped asking him. It wasn't contradicted at all. You just cut him short --

MR. MEDRANO: When I asked this man --

THE COURT: -- when I -- when I sent the jury home for the evening because you were getting into something that -- then she said I want to get into it and I'm going to bring the brother and I'm going to do this. And I said: well, you've gotten into this.

MR. MEDRANO: Well, Your Honor, the thing is when I asked him, do you have any personal knowledge of this, he said no.

THE COURT: He didn't contract him --

MR. MEDRANO: He said he didn't have any personal knowledge. How can he go ahead and say --

THE COURT: He said his brother did.

MR. MEDRANO: Your Honor, for the record --

THE COURT: Mr. Medrano, don't argue about this. He hasn't testified about any bribes, you're right. He hasn't mentioned a bribe. He didn't mention that Mr. Garza had talked to his brother. He did mention that.

MR. MEDRANO: And the headline says: offered bribe.

THE COURT: Well, that's fine. That's the newspaper. That's --

MR. MEDRANO: Well, I'm very concerned about it, Your Honor.

THE COURT: But the jury's already been -- the jury's already been -- You're what?

MR. MEDRANO: I'm very concerned about this. I really am. I think this can go ahead and so prejudice my client's right to have a fair trial --

THE COURT: I will ask him if anybody has read any article or seen anything, and I'm going to remind them again that they need not to, and that if anybody has talked to them or anything that we need to know those things.

MR. MEDRANO: If they have -- if they indicate, I would ask the Court to go ahead and inquire of the jury if they have read something in the paper about this case, please approach the bench so that we can go ahead and quiz them for the record --

THE COURT: No. Better still, I'll tell them to tell the Marshal to tell me.

MR. MEDRANO: That's fine, Your Honor.

THE COURT: And that's all we need to do, and then we'll find out.

MR. MEDRANO: I'll submit this article for purpose of the record, Your Honor.

THE COURT: Fine.

MR. MEDRANO: For this -- this question.

MS. BOOTH: Your Honor, can I have --

THE COURT: But this is not an unusual situation. Trials get reported on, on a regular basis.

MR. MEDRANO: I agree with the Court.

THE COURT: But, you know, for some reason here, whenever there's an article in the paper, somehow everybody wants me to start asking every single juror: did you read about?
Well, in metropolitan areas, which basically we are, it's not the normal practice that you start asking every single time there's a newspaper article about something: did you read it?

MR. MEDRANO: Judge, because we are dealing with a jury that's education and can read and write without -- without the Court's (indiscernible).

THE COURT: All juries ---- all jurors one of the requirements is that all jurors can read and write.

MR. MEDRANO: And I'm concerned that they have gone ahead and read this, Your Honor.

THE COURT: This is not any different a jury than any other situation. You just wanted to put this on the record, but the fact situation is that anytime there's a trial with a high profile person involved or an official or something, there's going to be some report about it in the paper. And --

MR. MEDRANO: And we should just ignore that?

THE COURT: No, I'm not saying just ignore it, but somehow -- let's not be so provincial that we start thinking: there's an article in the paper; I want to ask them. I'm not telling -- I've had Mr. Lindenmuth, and you all can tell him I said this about him, but we may have just an innocuous trial with nobody that anybody's heard of; and if there's a newspaper article, he wants to immediately quiz the jury: did they read about it? This is slightly different. Yes, you're right, this is a slightly different situation. But articles are going to come out in the newspaper about trials. That doesn't mean that you immediately start asking every single juror: did you read the article yesterday, did you read the one the day before, or whatever. I will get into it because you say you're very concerned about it out of an abundance of precaution. I don't need

to get into it. They've been instructed. I do that quite a bit with regards to my instructions. I'll instruct them again, and I'll ask them if anybody has read anything about it, have you talked to anybody about this case, have you listened to anything about this case; and if you do, let me know now, and then we'll discuss it up here. I won't even ask them to talk to the Marshal. I'll just ask them to discuss it here with me.

MR. MEDRANO: Thank you.

THE COURT: Is there anything else?

MS. BOOTH: Your Honor, may I have two minutes to talk to my witness?

THE COURT: I'm planning to take a break here.

MS. BOOTH: Great.

(Recess from 10:50 to 11:01 a.m.)

AFTER RECESS

(Jury in at 11:01 a.m.)

BY MS. BOOTH:

Q Mr. Solis, yesterday you testified that you were not pleased -- on cross-examination by defense counsel that you were not pleased with the work that your attorney had done. I want to ask you some questions about that. You said that you didn't try to contact the Bermeas, that you called -- Who did you call now, Mr. Solis?

A My sister.

Q And do you remember what day it was that you got arrested,

MR. PENA: Very briefly, Your Honor.

THE COURT: Mr. Pena, you've got a calendar out like you've got some kind of conflict?

MR. PENA: No.

THE COURT: Or is that a Bible?

MR. PENA: No, I had a conflict, but that's immaterial, Judge. Judge, last night I didn't see it, but there was a one-hour long series on -- involving this case, and I simply want to know --

THE COURT: It wasn't this case, Mr. Pena.

MR. PENA: Well, I didn't see it, Judge. I was called. But I'd like to know if --

THE COURT: I was called and -- you know, from somebody in Boston. They didn't even mention this case. They were talking about some woman's case. So I really don't know what was on the program, but they mentioned some woman's case that was on.

MR. PENA: Somebody saw it, Your Honor.

MR. MEDRANO: Your Honor -- I did see it, Your Honor, and I'll tell the Court as an officer of the Court that last night I was watching TV, Channel 4. This CBS reporter, Ed Bradley, had an hour long series during which approximately fifteen minutes of the show was devoted to supposedly an investigation concerning narcotics trafficking down here and specifically in Starr County. During the course of the

presentation of this investigation or this report my client's name, Honorio Garza, and his photograph from when he was arrested, his mug shot, as well as the Hill Country Ballroom all were shown on TV --

THE COURT: The one Mr. Solis wants twenty-five percent of?

MR. MEDRANO: That's right, Your Honor.

(Laughter)

MR. MEDRANO: In the context, Your Honor, whereby, if I recall correctly, the -- also statements were made by federal agents, Mr. Ball specifically, that other than forty percent of the people in Starr County are involved in narcotics trafficking, he also went on to state there's a problem with corrupt public officials. Afterwards, Mr. Bradley went ahead and said, in fact, quote, unquote, words to the effect: These three public officials have all been charged and some convicted for trafficking in marihuana, and they said: In fact, this constable - and they showed his photograph, his mug shot, owns this ballroom and he's awaiting trial concerning charges against him. He's been arrested and charged for trafficking and conspiring to go ahead and traffic in marijuana.

THE COURT: So far with regards to the part about your client, the jury knows every single thing like that. They know he's been arrested, they know he owns the Hill Country Ballroom they know he's a Starr County constable, and they know that he's

being tried for it.

MR. MEDRANO: Your Honor, but the problem is --

THE COURT: So far you haven't said anything about your client that this jury is not aware of.

MR. MEDRANO: The problem, Your Honor, is --

THE COURT: The other problem is -- not a problem, but I've already told them not to listen to anything.

MR. MEDRANO: The problem wi -- being that the way it was presented, Your Honor, that section, it was stated that these are the corrupt public officials of Starr County, and they included him with photographs of two other gentlemen who have already been convicted by this specific Court.

THE COURT: Mr. Medrano, I've already instructed this jury.

MR. MEDRANO: Yes, Your Honor. I would -- I would ask the Court --

THE COURT: I mean, it would have been like in the William Kennedy Smith trial if the Judge every morning started asking every single juror again: Did you read the paper tod -- I mean, those people couldn't possibly have escaped it unless they were-placed in a cocoon or something.

MR. MEDRANO: I would ask -- That's why I would ask the Court --

THE COURT: But that's not the kind of situation we have here. I don't think the whole hour was devoted to Hidalgo and

Starr County. In fact, there was a brief segment in one of those expose type stories that have become pr -- or programs that have become prevalent on the networks, but it wasn't the whole hour that was devoted to Hidalgo and Starr County.

MR. MEDRANO: Judge, what I would ask the Court to do --

THE COURT: Isn't that correct?

MR. MEDRANO: That's correct. That's what I said, Your Honor.

THE COURT: It was probably a ten or fifteen minute segment.

MR. MEDRANO: That's what I said, Your Honor. Judge, what I ask the Court to go ahead and do is this, is not just go ahead and tell them to disregard what they saw but to go ahead and tell them: If you did see something or if you see something, please disregard it; you're only supposed to go ahead and make this decision based on the evidence you hear in this Courtroom.

THE COURT: They've already been told not to. Yesterday they told me they hadn't, and today again when they leave, I'm going to say: If you have seen something, you are to disregard it. And I will do that again at the end of the case as I always do. Mr. Quintanilla?

MR. QUINTANILLA: Your Honor, I -- I would also for the record just like to state that I too saw that TV show last night Your Honor, and frankly --

THE COURT: Why weren't you all working? What were you all doing watching TV?

(Laughter)

MR. QUINTANILLA: Your Honor, my --

MS. BOOTH: I was up here working, Your Honor.

MR. QUINTANILLA: -- my mother and father called me, and they felt it was damaging to Mr. Garza. They've been following this --

THE COURT: And what does that have to do with you?

MR. QUINTANILLA: Well, you asked me if I was working. I was working, but they called me and asked me to watch the show, Your Honor.

THE COURT: Okay. But it has nothing to do with your client.

MR. QUINTANILLA: Well, Your Honor, what does bother me though is the fact that Mr. Alvarez did come on that show. He was shown doing a raid. You could clearly identify him, Your Honor. Secondly, his boss, Mr. Ball, --

THE COURT: That's another thing. I mean, even if they saw that, do you think that this jury would be surprised that Mario Alvarez was involved in a raid?

MR. QUINTANILLA: Well, Your Honor, the other thing that bothered me is that his boss, Mr. Ball, gets on there and he states that -- I wrote this down, that drugs

THE COURT: I have a hard time knowing that Mr. Ball is his

boss let alone the jurors.

MR. QUINTANILLA: -- drugs drive the economy of Starr County, Your Honor. Forty percent of the people in Starr County are involved in narcotics.

THE COURT: Is that something new that's been said that nobody's ever heard before, Mr. Quintanilla?

MR. QUINTANILLA: Well, Your Honor, I mean --

THE COURT: I mean, that has been beat to death over and over again. I mean, I don't think that the jurors watching that -- would have been the very first time that they hear that.

MR. QUINTANILLA: I just find it pretty unfair, Your Honor, that it came out at the time of this trial, Your Honor.

THE COURT: The forty percent figure really -- But what I'm saying is, so we can get all this on the record, the forty percent figure is low by some -- what some of the allegations have been in some of the other publications that have been made. Some publications say fifty percent. some news stories say that.

MR. QUINTANILLA: Yes, sir, Your Honor.

THE COURT: Those allegations, they've been around for years.

MR. QUINTANILLA: Yes, sir, Your Honor.

THE COURT: They've been in every national publication, Newsweek, all those publications have carried this about Starr County. I don't think that the --

MR. QUINTANILLA: I just think they're -- they're

unfair, Your Honor.

THE COURT: What?

MR. QUINTANILLA: And it's just -- just they're unfair allegations. And I just think that the timing of this newscast with the -- or with this news story with this trial should be brought up, Your Honor.

THE COURT: Well, just so that it'll be clear, I mean, those allegations have been around for a long time, and there are a lot of people who get very upset about them. And I don't think that this would have been -- if the jurors saw this, that this would have been the first time they heard this. But I have instructed them. I will take what Mr. Medrano has said to heart and explain to them again, if for some reason you did see something, you can't consider it.

MR. QUINTANILLA: Thank you, Judge. Thank you, Judge-.

MR. FUENTES: And, Judge, I'd ask the Court to inquire of the Government whether they -- they called the media and particularly told them that this trial was going on today. I mean, they have been real free with their money, Judge. They give it away to thieves and drug dealers --

THE COURT: Ed Bradley got some of this money?

MR. FUENTES: Well, we don't know, Judge. I'd ask the Court to inquire of them. For all we know

THE COURT: Mrs. Booth, is Ed Bradley a confidential informant in this case?

MS. BOOTH: Judge, I don't even know Ed Bradley, and I didn't see the tape. I --

THE COURT: Mr. Garza, I think he wants the Hill Country Ballroom.

(Laughter)

MS. BOOTH: I didn't even see the tape in question. I didn't know it was going to be on.

(Pause, attorney conferring/whispering)

MR. FUENTES: For all we know -- I mean, the DEA could have paid for ad time, Judge. I mean, I don't know.

THE COURT: Well, let's -- let's not get a little bit outrageous. Is there anything else? Mr. Diaz, did you have something?

MR. DIAZ: Your Honor, my concern --

THE COURT: Where'd you get that imitation Beatle tie, Mr. Diaz?

(Laughter)

MR. DIAZ: For your birthday, Judge.

THE COURT: That's nice.

MR. DIAZ: The Men's Warehouse, Your Honor.

THE COURT: It's nice.

MR. DIAZ: Thank you, sir.

My concern is that if any of the jurors did see it, has it impacted upon them to the point to where they cannot be

fair and impartial anymore. That would be the thrust of my question to them as far as --

THE COURT: I'll go through the instructions again sometime today and we'll discuss that.

MS. BOOTH: And, Your Honor, --

THE COURT: But, frankly, Mr. Diaz, what Mr. Medrano said what they said about his client, he himself has brought out some of that to the jury. They've heard all that, what his occupation is, where he's from, what he owns, what he's charged with. What was said about Starr County, as I have said, has been said over and over and over again, and it frankly is a bothersome thing to hear for both of us who have strong connections to Starr County, but it's something that's been said over and over and over again. This would not be the first time that that's said. I will go ahead and do what I said I would. Is there anything
else that we need to do?

MR. DIAZ: Your Honor, and I'm not belaboring the point, but that would be after the fact. It would -- to me would appear to me to be cumulative evidence to the jury outside of the Courtroom.

THE COURT: None. I mean, there's cumulative evidence of nothing with regards to Mr. Garza other than what they already know.

MR. DIAZ: Well, I'm talking about the -- the television.

THE COURT: The television is not cumulative evidence

of anything. Is there anything else?

MR. ALMARAZ: If Your Honor please. Being from Laredo, I was going to bring some mariaches (indiscernible) to Your Honor, but the Government said they would object.

THE COURT: But you were afraid I'd yell at you.

(Laughter)

MR. SPEAKER: That, too.

MR. ALMARAZ: Happy birthday anyway, Judge.

THE COURT: Thank you. Go ahead and bring the jury in.

(Jury in at : a.m.)

THE COURT: Please be seated. Mrs. Booth, you were fixing to call your next witness, ma'am.

MS. BOOTH: Yes, sir. Before I do that, we have a stipulation for the Court on the testimony of a witness that would have testified

THE COURT: Ladies and gentlemen, this is a stipulation which would mean that it is evidence.

MS. BOOTH: The name of the witness is Don Prall, and he is a chemist from the Drug Enforcement Administration. This -- He would have testified -- or the stipulation is that he is a DEA chemist qualified to make -- to do examinations of controlled substances, that he did examine a controlled substance that was submitted to him, that that controlled substance was marijuana, and that the chain of custody as to it coming to him and him having it in his custody was a proper and adequate one.

There is one other thing that you may have. As you deliberate you may not be sure about something. And that to me is reasonable doubt. If you're not sure that someone is guilty -- I submit to you, you vote Not Guilty. Because you have a reasonable doubt. And I ask you to do that. Thank you very much.

THE COURT: Thank you, Mr. Pena. Mrs. Booth, you have your rebuttal time now, ma'am.

MS. BOOTH: Yes, sir.

MR. QUINTANILLA: Your Honor, I want to get my things out of here. I'm sorry --

THE COURT: Sure.

(Pause)

MS. BOOTH: Just a little bit longer, Ladies and Gentlemen. Thank you for your attention all day. I want to start with some of the comments that David Almaraz made about his client, Matilde Perez.

But I want to talk to you about what he didn't mention. He spoke to you for minutes and he didn't talk about any of the facts in this case. He didn't explain the phone tolls. He didn't explain the paper plate or the other calculations we found. He didn't talk about any of the facts. All he did was talk about how horrible the witnesses were, Ladies and Gentlemen.

Juan Solis. Jaime Gonzalez. And Carlos Gonza -- and Carlos Gomez have been put on trial here. Not these men that are indicted. But those three men. It seems like the burden

has shifted here, Ladies and Gentlemen. To the three men that are witnesses. All you hear were nasty words about the witnesses. Coke head. And Ladies and Gentlemen, where was the only coke that was found in this case found? It was found in a vehicle in front of Matilde Perez's house, that's where the only coke was found.

Now about Toscano -- he talked very eloquently for about minutes and he never ever mentioned the facts concerning his defendant. Not ever. He never explained to you about anything. Only how bad the witnesses are. And he talked about law very beautifully.

Now, Ladies and Gentlemen, Joe Martinez talked to you about Baldemar Bermea. Did he ever talk to you about the facts? Never. None of them talked about the facts, Ladies and Gentlemen. They only shifted the burden to how horrible Jaime Gon --

MR. QUINTANILLA: I would object, Your Honor. The -- the burden never shifts, Judge.

THE COURT: The burden never shifts from the Government, Ladies and Gentlemen. It's the Government to prove each defendant guilty beyond a reasonable doubt. Go ahead, ma'am.

MS. BOOTH: The attention of focus here was tried to be shifted away from the defendants on to the witnesses, Ladies and Gentlemen.

Now, Joe Martinez would have you believe that I'm some kind of Plaintiff's attorney and I'm looking for money or

something like that. Ladies and Gentlemen, that's not my job. I represent the people of the United States of America. My job is to take narcotics traffickers off the streets.

MR. PENA: We would object to that, Your Honor. Move for a mistrial.

MR. MEDRANO: I'm going to object to this, Judge. There's -- there's no reason for this --

MS. BOOTH: Why?

MR. QUINTANILLA: I move for a mistrial also, Judge.

MR. MEDRANO: -- Judge.

THE COURT: There were some statements made about her and her prosecution of the case, all she's saying is that she represents the Government here.

MR. ALMARAZ: Her job is to see that justice is done, Your Honor. Not to take narcotics smugglers off the streets.

THE COURT: To represent the Government -- here is what she's doing and that's what she's indicated.

MR. PENA: Could I have a ruling on my motion for mistrial, Your Honor?

THE COURT: Your motion for mistrial is denied.

MR. PENA: Thank you.

THE COURT: And Ladies and Gentlemen I will give you instructions about the Government's burden and the Government's role with regards to what they have to prove beyond a reasonable doubt and what one of these attorneys says, including Mrs. Booth,

doesn't change that in any way whatsoever. Go ahead.

(Pause)

MS. BOOTH: Ladies and Gentlemen, let's talk about Guadalupe Bermea and his -- what Mr. Fuentes talked about. He talked about raindrops and balloons and paint and angels and rats and stomach aches and chips and boxes. All types of things and Gentlemen, but he never talked about the facts. Not once. Not one time did he talk about the facts. Did he tell you why the Bermea brothers went and bought a trailer and put it in the name of a woman? Did he talk about any of those things? No, Ladies and Gentlemen. He didn't.

(Pause)

Honorio Garza's attorney -- Mr. Medrano. Never talked about the facts, Ladies and Gentlemen. He never talked about the mobile phone.

MR. MEDRANO: Judge I'm going to object to that. That's a total misrepresentation of my closing argument, Your Honor. I went ahead and went through all of the witnesses and what they said and didn't say. And that's an outright misrepresentation to this Jury, Your Honor.

THE COURT: The Jury can make that determination. They know that anything you said or what she said is not evidence in the case and she has a right to express her opinion about what she thinks you all said. But we all remember what everybody has said

here.

MR. MEDRANO: Thank you, Your Honor.

MR. FUENTES: And -- I told them not to believe anything I said, Judge.

(Laughter)

THE COURT: I won't even touch that with a ten foot pole, Mr. Fuentes.

(Laughter)

THE COURT: Go ahead.

MS. BOOTH: I'm smilingly --

THE COURT: Did you go to a barbecue Mr. Fuentes? Yesterday?

(Laughter)

THE COURT: Go ahead.

MS. BOOTH: Did he in any way attempt to explain to you the phone calls from Honorio Garza's house to the mobile phone of Enrique Avalos? Did he attempt to explain to you the telephone call from Honorio Garza's house to the Sands Motel in Giddings, Texas on the date when we are alleging that there was a -- a load of marijuana taken up there? Did he talk to you at all about the telephone calls from Honorio Garza to Eleazar Bermea up in Buddha - from his home.

MR. MEDRANO: Judge -- I'm -- I'm going to object. There's been no evidence whatsoever that Honorio Garza ever made a single phone call, Your Honor. Not one bit of evidence, Judge.

THE COURT: I'd -- I did -- I didn't -- did you say that

Miss Booth? I heard you -- I --

MS. BOOTH: Your Honor, I may have slipped that time.

MR. MEDRANO: Uh-huh. That time.

MS. BOOTH: I did.

THE COURT: Well go ahead and limit yourself.

MS. BOOTH: From the home of Honorio Garza or his business. To the home of Eleazar Bermea, Ladies and Gentlemen. No attempts have been made to explain that situation.

MR. MEDRANO: Judge, I'm going to object, because Your Honor --

MS. BOOTH: Mr. --

MR. MEDRANO: -- oh, I don't have a single bit of -- of burden, Your Honor, to go ahead and present any evidence whatsoever.

THE COURT: Ladies and Gentlemen the Defendants have no burden. I've already told you that. It's the Government's burden here. The Defendants have no burden to present any evidence. Whatsoever. Go ahead, Mrs. Booth.

MS. BOOTH: Now, Ladies and Gentlemen, it may be just a coincidence, but it's real interesting that in late July of 1988, you heard testimony about large sacks of money being delivered by Honorio Garza. About him being paid out of a -- out of a briefcase. And it's real interesting that that happened in July of 1988 and then in August of 1988, Honorio Garza was able to go buy a 90,000 dollar CD, Ladies and Gentlemen. Could be coincidence.

Now, Mr. Medrano would have you believe that when a Constable comes to the Drug Enforcement Administration and demands to know who is making allegations - and what the investigation is about. Is something that should happen. Ladies and Gentlemen, people do not walk in off the street and demand to know confidential informants and demand to know what's going on in an investigation. That would have been special treatment. That would have been despicable for us to turn over our investigation just because Honorio Garza was one of us. He was a law man. He was a Constable. That would have been special treatment and that would have been wrong. That's why it wasn't done.

(Pause)

Now, Ladies and Gentlemen, Enrique Avalos. And the phone tolls on the mobile phone, Ladies and Gentlemen. They were found in 1989. But look at the dates on that mobile phone. The bill was issued in September of 1988. The time period of the conspiracy, Ladies and Gentlemen. That 409 dollar bill was during the time period of the conspiracy.

(Pause)

And Mr. -- Tovar never really spoke about much except that to compare this to a movie. To compare this and talk about a movie, Ladies and Gentlemen. This is a very serious thing we have before us. This is very serious. Both for who's on the United States and for these 12 men, Ladies and Gentlemen. This is not a movie. What you do today will affect not only these men, but

the community in which we live in.

(Pause)

Now you heard a lot of testimony about Jaime Gonzalez. And I just wanted to refresh your memory, just a little bit, on what some of the agents testified to about how many cases this man has made. How much coke has been taken off the street. How much marijuana has been taken off the street. How much marijuana has been taken off the street, because of this man. And Mario Alvarez testified, that if we catch them lying, they're out. But what has Jaime Gonzalez done? He's been effective. As horrible as his past may be, the man has been effective. Because the only way we can get in to these people, is to send one of them in. They can get in, Ladies and Gentlemen. And that's why Jaime Gonzalez is effective. And that's why they let him in the first place. Because he's one of them.

(Pause)

Now, Mr. Diaz got a little confused. And I want to point out that little confusion. On -- on Teodoro Pedraza. What you're going to see when you look at the exhibits, are that number 1, that the Western Star truck tractor is in the name of the Pedrazas. And there was another vehicle. A 1953 -- some kind of Ford vehicle -- that's also in the Pedraza's name.

Now the -- what he was talking about with the sale of Bobbie Barter? That's not the tractor, Ladies and Gentlemen. That's the trailer. A trailer that was sold to the Bermeas. And that has to do with Count Two the indictment.

MR. DIAZ: Your Honor, I object that I was -- that I was confused. I -- when I alluded to that it was to show that they could prove that the trailer was -- sold and they brought in Exhibit 36, 37, 38 and 39 -- which is the -- the sale invoice. Beulah Gonzalez received the money. And I was saying that they could have proved that Mr. Pedraza was involved if they could have. So I'm was not confused at all, Your Honor.

THE COURT: Okay. I think you -- I think -- I think you cleared up what you meant to say.

MR. DIAZ: Thank you, Your Honor. Thanks.

THE COURT: Go ahead.

MS. BOOTH: But the trailer went to Counts 2, 3 and 4. Counts that did not involved Mr. Pedraza. A gentleman, his attorney calls him. Now Ladies and Gentlemen what do you expect him to say? Do you expect him to say I'm not going to call my client a "Compadre". Do you expect that Ladies and Gentlemen? And you know what? There's never going to be enough evidence for a defense attorney.

MR. MEDRANO: Your Honor

MS. BOOTH: And no matter what they say about ca --

MR. QUINTANILLA: I would object, Judge.

MR. MEDRANO: Your Honor, I want to approach the Bench, Your Honor.

MR. QUINTANILLA: I want to move for a mistrial.

MR. MEDRANO: I want to -- I want to -- approach the

bench, Judge.

MS. BOOTH: Your Honor, I'm responding only to their arguments.

MR. MEDRANO: Judge --

MR. QUINTANILLA: Your Honor --

MR. MEDRANO: -- I want to approach the Bench, please.

THE COURT: Hold on just a second. Let Mrs. Booth -- you refrain from that part. And -- all of you have made references to other cases, to other situations. That's not permissible, Ladies and Gentlemen. We're just deciding this case. And on the evidence here and on the law as I give it to you. Not what somebody else has observed some other place. And some of the defense attorneys - I've corrected them on that. I'm correcting Mrs. Booth on that, now also. And I'm making it clear here. With regards to the Motion for Mistrial, that's denied. Does anybody still need to come up here?

MR. MEDRANO: No.

THE COURT: Go ahead.

MR. PENA: We'd like to elaborate on that motion, Your Honor, at -- at a later time.

THE COURT: No, let's come up here and do it now then.

(Pause)

BENCH CONFERENCE:

THE COURT: Okay, Mr. Pena, what is it?

MR. PENA: Your Honor, Mrs. Booth has put her -- her

entire (indiscernible) on her person -- her individual behind -- behind her remarks. She has told the Jury that it's her job to take the drugs of the streets and prosecute the drug dealers. Now this is her -- this is not her job, but she has --

THE COURT: I've already corrected that.

MR. PENA: Well, but Your Honor, I'd for the record to show that my grounds -- that she has placed her own remarks --

MS. BOOTH: Your Honor, I wish he would lower his voice.

MR. PENA: Well, she has placed her own remarks (indiscernible) -- on -- on her statement that this is her job.

THE COURT: Mrs. Booth was responding to arguments that were made. And I never heard her once stood up when there were mischaracterizations as to what her job is by some of the defense attorneys. There were quite a few -- she's a plaintiff's lawyer, they do this for money. There were all sorts of mischaracterizations. The Court has corrected that. The Court has already told the jury to disregard some of those statements that have been made here, that need to be disregarded. This isn't going to turn on that. The Court has already corrected that. I denied the Motion for Mistrial of whoever made it at the present time at that time. Now what is your Motion for Mistrial motive?

MR. PENA: That's it, Your Honor. I enjoin the --

MR. MEDRANO: Your Honor, please let me (indiscernible)

MR. PENA: Your Honor, I thought you told us that we were

joined in this.

THE COURT: That's right.

MR. ALMARAZ: Your Honor --

THE COURT: Okay. Well, this isn't this last that date you were here.

MR. PENA: What I -- what I want to (indiscernible) --

THE COURT: I was asking if anybody wanted to elaborate on this.

MR. ALMARAZ: On behalf of Matilde Perez, Your Honor, my objection is that the last statement by Miss Booth, where she states that --

THE COURT: There's never enough evidence for a defense attorney.

MR. ALMARAZ: -- there's never evidence -- she has -- she has shifted the burden to the defense, Your Honor.

THE COURT: She has and I've already corrected that.

MR. ALMARAZ: We also move for a mistrial.

THE COURT: Okay. And that's been denied.

(Everybody talking)

THE COURT: Everybody's made that motion.

MR. MEDRANO: Your Honor, for Honorio Garza, too, the points that I want the record to reflect and I want to document the other motions for mistrial. But, Your Honor, she's been sifting on the edge, Judge. And (indiscernible) the fact Honorio Garza phone calls to his house, that that was (indiscernible) --

THE COURT: That was corrected.

MR. MEDRANO: -- Your Honor, and this Court knows that the record reflects that I have specifically requested on numerous occasions that Miss Booth please stop doing that.

THE COURT: I've corrected that.

MR. MEDRANO: And, Your Honor, she always is doing this. She's always doing this, Your Honor.

THE COURT: No, that's not true.

MR. MEDRANO: And secondly, Your Honor --

THE COURT: I -- I cannot let you say that on the record --

MR. MEDRANO: and -- and she goes ahead --

THE COURT: -- because I'm going to base it on my prior -- I will based this on my prior situations with Mrs. Booth. Because she has appeared here a lot and she is one of the attorneys, the Government or defense side, that I can honestly say does not do things on purpose with regards to any violation of any motion in limine or anything else. I cannot let you say that on the record.

MR. MEDRANO: Why?

THE COURT: Because that's not true, Mr. Medrano.

MR. MEDRANO: Off of the record? That (indiscernible) I had against her? She did exactly the same thing.

THE COURT: That has not been my --

MR. MEDRANO: Well --

THE COURT: -- observation.

MR. MEDRANO: -- I was there. And the other point, Your Honor --

THE COURT: That is not -- that has not happened

MR. MEDRANO: And you -- your --

THE COURT: -- in my years of dealing with her.

MR. MEDRANO: -- well and you -- well and -- and --

MS. BOOTH: Your Honor, I think it's important --

MR. MEDRANO: -- and the other point -- and the other point, Your Honor --

MS. BOOTH: -- the first case I -- I tried in this case, (indiscernible) was with Eddie Medrano, there were no phone tolls in the that case, it was a border case, Your Honor. Importation.

MR. MEDRANO: Your Honor, the same thing I'm using (indiscernible). She -- she knows (indiscernible) --

THE COURT: Okay. I have motion for mistrial. Denied.

MR. MEDRANO: And she, Your Honor -- the second point that I wanted to talk (indiscernible) -- she goes ahead and (indiscernible) shift the burden on Mr. Honorio Garza when she says: And why didn't they go ahead and come and disprove this. And why they didn't disprove that? We don't have to disprove anything, Your Honor.

MS. BOOTH: No, Your Honor.

THE COURT: She didn't do that and the Court corrected that.

MR. MEDRANO: Well, if she didn't do them, why did the Court have to correct it?

THE COURT: What?

MR. MEDRANO: If she didn't do them, why did the Court have to correct them, Your Honor?

THE COURT: You know, frankly -- she could have gone a lot further based on what you did. You asked your client to stand up, you asked them to look at him. I know that Juan did the same thing. Y'all were doing a lot of things with regards to trying to bring in testimony through your closing arguments. Mr. Diaz specifically asked his client for them to look at it, to make a judgment on him and to decide whether he was guilty or not guilty just by looking at him.

MR. MEDRANO: Well, Your Honor --

THE COURT: You did the same thing.

MR. MEDRANO: I don't care about anybody else.

THE COURT: No. But you did the same thing, you asked your client to stand up --

MR. MEDRANO: (Indiscernible)

THE COURT: -- you -- were basically implying that he was there for testifying by doing that and frankly she could probably have approached the Bench and asked to do some things or requested that certain things be done and she didn't. I've corrected anything that she's done that's incorrect here. And I will continue to do so.

MR. MEDRANO: That's (indiscernible) --

THE COURT: So, Mrs. Booth, prevent yourself from doing that.

MR. MEDRANO: Motion for Mistrial (indiscernible)

THE COURT: Yes, yes.

BENCH CONFERENCE ENDED

THE COURT: Go ahead, Miss Booth.

MS. BOOTH: (Indiscernible). And the two attorneys for Manuel Garcia, what did they talk about? They talked about the fact that he was only charged in one conspiracy. Only one Count. And yet, Ladies and Gentlemen, we heard that the testimony was 8 to 12 loads. 8,000 to 12,000 pounds. He's only charged in one conspiracy.

He talked about and the Sixth Amendment and Bill of Rights. And feeling and touching and love. Ladies and Gentlemen what we have here is a drug conspiracy before you. You have witnesses. You have witnesses, like I told you, that had I had the opportunity to pick them, they would not be these individuals. These are the people that the men that sit before you today picked to traffic in narcotics with.

And, you know, what you're going to be asked to do in a few minutes is very, very difficult. It's very serious. You're going to asking -- you're going to be asked to make a decision about peoples' lives. Not only these people, but the people in the community.

THE COURT: Please be seated. Mrs. Booth, do you reach an arrangement with regards to the phone tolls or the proposed exhibits that you were going to introduce?

MS. BOOTH: Your Honor, as tc some Defendants; but as to some Defendant, no, they'd like to ask questions to the custodian of the records.

THE COURT: Okay. So you're ready to proceed with that?

MS. BOOTH: Yes, sir, we are.

THE COURT: Okay. Well, let's go ahead and bring the jury in.

(Pause, attorney conferring/whispering)

THE COURT: We're going to go ahead and bring the jury in. Are we ready?

MS. BOOTH: Can I have five minutes, Your Honor?

THE COURT: I guess so.

MS. BOOTH: Thank you.

THE COURT: Who else wanted to bring something up, Mr. Diaz -- Mr. Quintanilla, you're right.

MR. QUINTANILLA: Yes, sir, Your Honor. I only --

THE COURT: You know, it's about the newspaper article again. Mr. Quintanilla, I can't be asking the jurors every single day: Did you read the monitor?

MR. QUINTANILLA: Your Honor, I read this Saturday morning, and it's unlike any other article which came out during the trial. It came out also --

THE COURT: It's just like every single article.

MR. QUINTANILLA: It came out also after the -- I don't think it is, Judge.

THE COURT: What's different from it here?

MR. QUINTANILLA: Your Honor, I've (given it --For the record, Your Honor, I've tendered a copy to the Court.

THE COURT: I -- Yes, we've got one for the record. Now, what is different from this article than the other articles?

MR. QUINTANILLA: Basically, Your Honor, it's this, Your Honor. In the first column - one, two, three, four - by the sixth paragraph: More than a hundred and ten thousand in cash, twenty weapons and jewelry were seized from -- That's not true, Your Honor. That's very prejudicial here. That was not introduced here. It was not introduced in this Court. And even more --

THE COURT: The hundred thousand dollars in cash was talked about, the jewelry was talked about, the weapons were talked about, and they were told to disregard that.

MR. QUINTANILLA: Your Honor, and I made an objection to that and I --

THE COURT: Right and we've got all that on the record and they've already been told to disregard that. I've done that. It's in the newspaper article. I've already told them not to read the newspaper, not to consider anything in the newspaper. What do you want me to do about it?

MR. QUINTANILLA: Second, Judge Hinojosa, it's the second column and the first column on page A where it starts to talk about Mr. Eleazar Bermea and his plea of guilty, Judge, and it mentions Ms. Booth's name. I don't -- I don't believe that Ms. Booth had an interview with the newspaper, but the newspaper person was here when he pled guilty. But it just give it the impression that when Mr. Eleazar Bermea pled guilty that all the other --

THE COURT: I'm sure she told the reporter if he asked her --

MS. BOOTH: Your Honor, I did tell him.

THE COURT: -- what's the maximum possible punishment; I'm sure she said it's three years. I'm sure she had a discussion with the reporter about a man who pled guilty. I don't prohibit that.

MS. BOOTH: I did.

MR. QUINTANILLA: Well, Your Honor, I find that as improper comments during the trial that it's brought up that this man has pled guilty and has agreed that a drug conspiracy did exist.

THE COURT: That's what happens every time somebody pleads guilty in the middle of a trial. You know, he pled guilty in open court. Anybody could have come in there and reported that.

MR. QUINTANILLA: Well, Your Honor, I just --

THE COURT: I was an open Courtroom.

MR. QUINTANILLA: My concern is that this is very, very prejudicial, Your Honor, and there is a reasonable likelihood that this will prevent a --

THE COURT: You know, this thing about --

MR. QUINTANILLA: -- fair trial for my client, Judge.

THE COURT: Well, if -- if that's -- I really don't understand whether you're making an objection or what.

MR. QUINTANILLA: I am making an objection, Judge.

THE COURT: To the newspaper article, I have no control over the newspaper.

MR. QUINTANILLA: I understand, Judge. I'm -- What I'm, raising though is, Judge, is the fact that if Ms. Booth did have this, there is the possibility that maybe the jury was -- I'm not saying Ms. Booth did this, Judge. Well --

THE COURT: She had every right to have talked --

MR. QUINTANILLA: I want to put it in a respectful manner, Judge, that Ms. Booth talked to the newspaper people in hopes that it would influence the jury.

THE COURT: I'm sure the way it happened is the newspaper person asked her: Where is Eleazar Bermea? What happened to him? He's pled guilty, she said --

MR. QUINTANILLA: Let's call him to the stand, Judge. He's in the Courtroom.

THE COURT: What?

MR. QUINTANILLA: Why don't we call him to the stand; he's in the Courtroom.

THE COURT: But there's nothing to call him to the stand about. There's no problem here as far as Mrs. Booth having told him that. You know, the thing about even if jurors -- I've already told them, this is like -- you'd have to read almost the entire article to get to that part. I've already -- You're basically questioning the impun - you're impugning the jury here. The jury has already been told not to read this. They haven't given me any indication that they've read it. It's going to come out every single day. That's the kind of trial that it is. And to stand up here every morning and say --

MR. QUINTANILLA: None of the defense attorneys have commented to the newspaper, Judge. Why should the prosecution be allowed to do that?

THE COURT: You know, what's the comment here? He's pled guilty to a misprison which is in open court, open record. Anybody can read the file, read the minutes of the plea, anybody that wants that. The other thing is - and I know there may be an ethical situation with regards to some of this - I've never told a defense attorney that they can't talk to the media during a trial.

MR. QUINTANILLA: I believe it's in the Code of Professional Responsibility, Judge, that an attorney or a lawyer from both sides --

THE COURT: She didn't express an opinion about the case and your client. She expressed an opinion as far as the maximum possible punishment in a case where a defendant had pled guilty to. She didn't express any opinion whatsoever with regards to your client or any other client still on trial. Not one word about that. The case of Eleazar Bermea is over. As far as this trial is concerned, he has pled guilty to. He is no longer on trial. She had a right to say if the reporter asked her: What's the maximum possible punishment here or what is this about? I don't have any problem with that.

MR. QUINTANILLA: Your Honor, I guess my objection would be that -- that I object to Mrs. Booth having spoken to them during the trial because it caused a situation which could have possibly raised the likelihood that the jury took that into consideration, Judge, just so that the jury could take it --

THE COURT: The jury's been told: Eleazar Bermea's case has been disposed of; you can't consider it.

MR. QUINTANILLA: Well, if she talks about Eleazar Bermea's case --

THE COURT: Let me tell you another thing. Let me tell you another thing, Mr. Quintanilla. If the jury were to find out that one of the Defendants pled guilty, it can work both ways. It can either be, well, the rest of them aren't guilty and he was, or, they're all guilty. That's what happens anytime that something happens in the middle of a trial where some people plead

guilty. I've never told them: Well, you don't have to consider so and so because he's pled guilty. But, frankly, even if they knew that, that can work both ways. Either all the rest of them didn't plead guilty because they're not guilty or, well, maybe they are guilty because he did plead guilty. So there's never any situation where the fact that they know that someone pled guilty -- But they've already been told not to read the newspaper article, and you don't have any evidence that any of them have.

MR. QUINTANILLA: I would only ask that you instruct them again, Judge.

THE COURT: I can't be doing that every time the Monitor comes out every morning. I tell them to follow my instructions, but I'm not going to tell them every morning: Did you read the Monitor this morning or did you read the Corpus Christi Caller?

MR. QUINTANILLA: I didn't read the Corpus Christi -- I (indiscernible), Judge.

THE COURT: It's not in there. I'm just saying that I'm not going to be quizzing them about individual newspapers.

MR. QUINTANILLA: This is the only one in the Valley, Judge. Nobody else reads another paper in the Valley.

THE COURT: That's not true. The Valley Morning Star is another paper. It competes with the Monitor. They come out --

MR. QUINTANILLA: The Monitor doesn't print the things the Valley Morning Star prints, Judge. I mean --

THE COURT: Sometimes they do. Sometimes they will yank a story from the Morning Star- and, frankly, the Morning Star has yanked some of these stories.

MR. QUINTANILLA: I never -- I never read Mr. Wolfe's article in the Monitor, Judge. It was the Valley Morning Star.

THE COURT: They missed it. It was a weekend or they would have picked it up.

MR. QUINTANILLA: Yes, sir, Judge.

MR. MEDRANO: Your Honor, on behalf of Mr. Honorio Garza, Judge, we're asking for a motion for mistrial based on all the fact of the following, Your Honor. I would beg to differ with the Court that anybody could have gone in there and there'd be no prejudice to my client as far as watching Mr. Bermea plead guilty. If one of the jurors had walked in there or one of the jurors had found out or examined the record that a co-Defendant in this case that he's been on trial with for most -- for the majority part of this trial had all of the sudden gone ahead and pled guilty while he was a co-Defendant with Mr. Honorio Garza wherein the statements contained therein that he admitted there was a conspiracy going on concerning marijuana trafficking --

THE COURT: Do you have any evidence that these jurors have been reading the Monitor?

MR. MEDRANO: Judge, I don't -- It's not a question of whether I have evidence of that or not, Your Honor.

THE COURT: Okay. So do you want to tell the Monitor:

Don't print any stories about this trial?

MR. MEDRANO: No, Your Honor. I --

THE COURT: Then what do you suggest I do?

MR. MEDRANO: What I suggest that you do, Your Honor, is to go ahead and --

THE COURT: Declare a mistrial and then tell them what? Newspaper, don't ever print anything again about this because Mr. Medrano doesn't like you printing it because the jurors might read it?

MR. MEDRANO: No, Your Honor. I think -- I think -- I think the issue here and for purposes of Mr. Quintanilla -- the local rules, Your Honor, prohibit counsel from other side discussing an ongoing case that's it in trial with the press.

THE COURT: That -- Eleazar Bermea is not an ongoing case. Eleazar Bermea is over.

MR. MEDRANO: Judge -- Oh, come on, Judge. This is the same case.

THE COURT: It is not an ongoing case.

MR. MEDRANO: It was the same case, Judge. He was a co-Defendant in this case.

THE COURT: It is not an ongoing case. okay. Cite me the local rule and Eleazar Bermea is not an ongoing case.

MR. QUINTANILLA: But (indiscernible), Your Honor.

MR. SPEAKER: It's Local Rule 14, Judge.

THE COURT: And what was it she said? She said

something serious like -- Ms. Booth said to a misprison of a felony is subject to be sentenced up to three years in federal prison. Now, that is a horrible thing for her to leave said a thing that anybody could have taken out of this file, a thing that anybody could have grabbed out of the open courtroom.

MR. QUINTANILLA: Except a juror.

THE COURT: That's right. But this --

MR. MEDRANO: That's right. Because according to --

THE COURT: -- the reporter could have grabbed this from anybody. You're being silly. You're being ridiculous. You're losing your effectiveness as far as this Court is concerned on this point because

MR. MEDRANO: Well, I disagree -- I disagree with the Court, Your Honor. So you're denying our motion for mistrial?

THE COURT: Yes, I am.

MR. MEDRANO: Thank you, Your Honor.

MR. QUINTANILLA: Judge, I would cite the local rule, Judge, for the record.

THE COURT: Okay.

MR. QUINTANILLA: It's Local Rule which cites

THE COURT: Read it.

MR. QUINTANILLA: -- which cites, Judge, that -- I don't have the local rules with me, Judge, but --

THE COURT: Well, you told me you were going to read it to me.

MR. QUINTANILLA: I said I would cite the local rule, judge.

THE COURT: Okay. Local Rule what?

MR. QUINTANILLA: And it's -- and it alludes to the free press and fair trial guidelines 87 FRD 519, 1980, Judge. And I would also --

THE COURT: Okay. And what does that rule say?

MR. QUINTANILLA: That lawyers are precluded from discussing the trial to the press during the time of trial, Judge.

THE COURT: Okay. Eleazar Bermea's not on trial anymore.

MR. QUINTANILLA: He's a co-Defendant, Judge, with --

THE COURT: He's not -- he's not on trial anymore. Eleazar Bermea's case is over.

MR. QUINTANILLA: And my -- my concern is not the --

THE COURT: So how does she discuss your case?

MR. QUINTANILLA: My concern is not the art -- the paragraph that you read, Judge, but the one following that that states under the agreement thirty-one year old Eleazar Bermea said he knew there was a marijuana trafficking conspiracy, that he allowed his home to be used for telephone conversations between conspirators --

THE COURT: And that he did not alert authorities about criminal acts, according to Booth.

MR. QUINTANILLA: -- and that he did not alert authorities about criminal acts, according to Ms. Booth.

THE COURT: Well, that was also what he indicated and said in open court when he pled guilty. That's what the charge is.

MR. QUINTANILLA: Well, then it does affect the rest --

THE COURT: What?

MR. QUINTANILLA: -- of the conspiracy, Judge. It does affect -- excuse me. It does affect the rest of the Defendants in this case, Judge.

THE COURT: Well, frankly, that's what he pled guilty to. That's what's in the file.

MR. QUINTANILLA: I too would move for a mistrial, Judge.

THE COURT: Okay. Well, that's denied. But, you know, to stand up and make a point about something like this is silly. It is time consuming. It's not worthwhile from the standpoint of, to be outraged about these comments even if they were made by Mrs. Booth --

MR. QUINTANILLA: I just feel -- felt, Judge, that it was an improper influence on the jury, if they did read it, Judge.

THE COURT: All of you -- What?

MR. QUINTANILLA: If they did read it. Most people read the McAllen Monitor.

THE COURT: Okay. But none of that -- none of that is related to Ms. Booth. In the Courtroom I told the jurors, Mr. Bermea's case has been disposed of. You do not have to be considering him.

MR. QUINTANILLA: And you didn't get into the specifics, Judge.

THE COURT: That's right. I didn't, but anybody that wanted to, the reporter included, could check the file and find out what happened to Mr. Bermea's case. You're upset because apparently the reporter asked Mrs. Booth what happened to Mr. Bermea's case and she told him.

MR. QUINTANILLA: I'm upset, Judge, because one of the attorneys in the case has talked to the newspaper and asked them -- and told them about this.

THE COURT: Okay. The -- All of you all go find that rule that he' talking about and make sure that you all comply with it.

MR. QUINTANILLA: Okay, Judge.

THE COURT: Did you hear that, Mr. Fuentes?

MR. FUENTES: I'll -- I'll comply with the rule, Your Honor.

MR. TOSCANO: Because this -- the -- Mr. Eleazar Bermea is so closely related to my client, Rogelio Bermea, and the jury has heard from the evidence the relationship and that this is a conspiracy between the brothers and the relatives, I feel I am

constrained to tell this Court that I know specifically on behalf of Mr. Bermea, Rogelio Bermea, move for the same things that --

THE COURT: Why?

MR. TOSCANO: We feel, sir, that the plea of guilty --

THE COURT: Because it was in the newspaper, something that happened in the Courtroom?

MR. TOSCANO: -- the plea of guilty knowledge that the jury might have seen --

THE COURT: Do you know that the jury knows about this?

MR. TOSCANO: No, sir. I'm saying if the jury -- if the Courts will assist us in taking whatever precautions that --

THE COURT: What do you want me to do? The rest of them have just stood up and talked about it, so what do you want me to do?

MR. TOSCANO: Judge, if they have -- again, because of the fact that this is a -- now going into a guilty plea --

THE COURT: If you quit saving (sic) time with this little exercise every morning, I'll just ask them: Did anybody read anything about this case or hear anything about this case? But, frankly, you all are act -- reacting for the sake of reacting.

MR. TOSCANO: The plea of guilty is something to react for because of the inferences that can be reasonably inferred by the jury in passing on the guilt or innocence --

THE COURT: No, but they'd have to read the whole

article. They will have to have disregarded their instructions that they were given under oath to follow. You're saying basically these jurors are not following their oath, they're not following your instructions and they're reading these entire articles.

MR. TOSCANO: No, sir, I'm not saying that.

THE COURT: In order to get to this, that's what they needed to have done.

MR. TOSCANO: I'm not saying that. I am saying that it would not hurt anyone for the Court to again remind them in light of the development --

THE COURT: I always remind them not to, and I will do it again. But basically what you all are standing up (sic) is you just want to stand up and move for a mistrial on some prejudice here that really they've already been told not to read about. But it's an exercise of "let's talk for the sake of talking here." There's been an article just about everyday in the Monitor except on Sunday because we didn't have any trial on Saturday.

MR. TOSCANO: I'm not talking about any other one except that one.

THE COURT: No, that -- Mr. Medrano has talked about several others.

MR. TOSCANO: I am not.

THE COURT: He's talked about the national media. He

was so upset that they -- according to him, the four points that were made were four points he'd already told the jurors about his client.

MR. TOSCANO: I have nothing further to say, sir, in regard to that.

THE COURT: Okay. Are you ready now with what you needed to present, Mrs. Booth, or you still need the five minutes?

MS. BOOTH: No, sir, I've got it now.

THE COURT: Okay. Go ahead and bring the jury in.

MR. DIAZ: Your Honor, I have got a motion, a Rule 29 motion.

THE COURT: We're not at that point yet. She hasn't closed or she hasn't rested.

MR. DIAZ: All right. Thank you, Your Honor.

MR. QUINTANILLA: Your Honor, another point here before -- She showed me some records and I just see some duplicity there with reference to the same bill over more than once, Judge. I haven't brought this to your attention, but I just saw that a while ago, Judge.

MS. BOOTH: If there's a problem with that, I'll cut it out, Your Honor. We'll -- We can talk at a break and cut out the part from Houston --

MR. QUINTANILLA: Thank you. I just noticed that or else I would have brought it to your attention, Judge.

(Jury in at 10:20 a.m.)

1729

THE COURT: Please be seated. Good morning, ladies and gentlemen. I hope you all had a good weekend. Ladies and gentlemen, is there anybody who has seen, read or heard anything about this case since you all were here on Friday?

(No audible response)

1729

THE COURT: Don't forget to continue to follow my instructions about what I've said about that. Mrs. Booth, you were not going to have a stipulation here; you were actually going to present some witnesses with regards to some records. Is that right?

MS. BOOTH: Yes, sir, we are.

THE COURT: Go ahead.

MS. BOOTH: Eliza Longoria, please.

(Pause)

THE COURT: Ms. Longoria, if you'd come up here and be sworn in, please.

(The Witness is sworn)

THE COURT: Go ahead and have a seat over here, please. Go ahead, Ms. Booth.

MS. BOOTH: Yes, sir.

DIRECT EXAMINATION OF ELIZA LONGORIA

BY MS. BOOTH:

Q Could you please state your full name for the record, Ms. Longoria?

A Eliza Longoria.